Supreme Court, U.S.
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No.

In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
PETITIONER,

v.

COMMUNITIES FOR EQUITY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EDMUND J. SIKORSKI, JR.
EDMUND J. SIKORSKI, JR., P.C.
3300 WASHTENAW AVENUE
SUITE 240
ANN ARBOR, MI 48104
(734) 677-2110

WILLIAM M. AZKOUL
WILLIAM M. AZKOUL, P.C.
161 OTTAWA AVENUE N.W.
SUITE 205-C, WATERS BLDG.
GRAND RAPIDS, MI 49503
(616) 458-1315

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
ALEXANDER MALTAS
LATHAM & WATKINS LLP
555 11TH STREET N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

QUESTIONS PRESENTED

The Sixth Circuit held that petitioner, the Michigan High School Athletic Association, Inc., violated the Equal Protection Clause, Title IX, and Michigan's Elliott-Larsen Act (which is co-extensive with the Equal Protection Clause). It reasoned that differences in some of the seasons selected for boys' and girls' high school athletic tournaments constituted "facial classifications" that triggered intermediate scrutiny, and that MHSAA had not satisfied its burden of establishing an "exceedingly persuasive" justification. The Court held that intentional discrimination could be presumed whenever differences "result in unequal treatment" of one sex. The following questions merit review by this Court:

(1) Whether the Sixth Circuit misinterpreted the legal standards governing proof of intentional discrimination in the context of constitutionally authorized single-sex programs, and erroneously determined that MHSAA violated the Equal Protection Clause, Title IX, and Michigan's Elliott-Larsen Act.

(2) Whether plaintiffs' Equal Protection claim under 42 U.S.C. § 1983 should be dismissed because Congress intended the comprehensive remedies authorized by Title IX of the Education Amendments of 1972 to be exclusive in this context, as recognized by the Second, Third, and Seventh Circuits.

LIST OF PARTIES

The petitioner is the Michigan High School Athletic Association, Inc., on behalf of itself and its members.

The respondents are Communities for Equity, on behalf of itself, its members, and all those similarly situated; Diane Madsen, on behalf of her minor daughters and all those similarly situated; and Jay Roberts-Eveland, on behalf of her minor daughter and all those similarly situated.

RULE 29.6 STATEMENT

Petitioner Michigan High School Athletic Association, Inc., does not have a parent corporation and no publicly held company owns 10% or more of Michigan High School Athletic Association, Inc.'s stock.

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The district court's opinion is reported at 178 F. Supp. 2d 805 (Pet. App. 69a-167a). The Sixth Circuit's first opinion is reported at 377 F.3d 504 (Pet. App. 50a-68a). The Sixth Circuit's opinion on remand is reported at 459 F.3d 676 (Pet. App. 1a-48a).

JURISDICTION

The judgment of the court of appeals was entered August 16, 2006. MHSAA's petition for rehearing *en banc* was denied on December 7, 2006 (Pet. App. 168a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the Fourteenth Amendment to the Constitution, Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), and Michigan's Elliott-Larsen Act, Mich. Comp. Laws §§ 37.2101, *et seq.*, are reproduced at Pet. App. 169a-177a.

STATEMENT OF THE CASE

This case concerns alleged gender discrimination in the scheduling of high school athletic seasons. This Court previously granted petitioner Michigan High School Athletic Association's ("MHSAA") petition for certiorari, vacated the Sixth Circuit's earlier decision, and remanded for further consideration in light of *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005). Pet. App. 49a. On remand, the Sixth Circuit has reaffirmed its prior ruling in all significant respects. The Sixth Circuit's holding that petitioner violated the Equal Protection Clause, Title IX, and Michigan's Elliott-Larsen Act (which is co-extensive with the Equal Protection Clause) presents two questions of national importance that merit review.

First, this case presents an opportunity to clarify a fundamental point about the meaning of intentional discrimination that has divided the lower courts. The only facial gender classification here was the decision made over

thirty years ago (and not challenged here) to have separate sports teams for boys and girls. Once separate programs are established, good faith implementing decisions (such as when the teams will play or who their coach will be) will inevitably create some differences that someone can claim are disadvantageous to one team or another. The Sixth Circuit held here that every inevitable difference in the administration of separate programs that someone can claim creates a disadvantage is a new facial gender classification sufficient to presume animus. That misunderstanding improperly shifts the burden of proof and conflicts with decisions of this Court and of other circuits. Mere differences in the implementation of separate programs do not themselves classify anyone by gender, and are constitutional unless the plaintiffs prove discriminatory intent (*i.e.*, that the relevant decisions were made because of, not merely in spite of, their differential impact by sex).

Second, the Sixth Circuit acknowledges a deep circuit split over whether Title IX is the exclusive federal remedy for alleged gender discrimination in athletics, or whether plaintiffs may also rely on § 1983. This Court's GVR in light of *Rancho Palos Verde* gave the Sixth Circuit an opportunity to reconsider its circuit precedent that Title IX does not preclude § 1983 claims. The Sixth Circuit reaffirmed its position, solidifying the split.

Factual Background

Petitioner MHSAA is a private, non-profit organization that conducts interscholastic athletic tournaments and promulgates rules of competition for voluntary adoption by its member schools. MHSAA conducts 14 tournaments for girls only and 14 tournaments for boys in which girls may also compete if there is no parallel girls' team (such as wrestling or football). CAJA 2004.[1]

As girls' athletics gained in popularity in the early 1970s, MHSAA's member schools faced significantly rising

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[1] "CAJA" refers to the Joint Appendix previously submitted to the United States Court of Appeals for the Sixth Circuit in this case.

numbers of athletes and teams without a comparable increase in the availability of facilities, coaches, and officials. Schools therefore decided early on that, in certain sports, different seasons for the boys' and girls' teams would allow them to offer more athletic opportunities for all students. For example, a school with one gym may not be able to run varsity, junior varsity, and freshman teams for both boys and girls at the same time. Scheduling the girls' basketball tournament in fall and the boys' basketball tournament in winter allows Michigan girls to play both basketball and volleyball (the two most popular girls' sports), and allows schools with limited facilities or coaching resources to avoid resource conflicts and offer a better program to all students.

Specific scheduling decisions were made only after extensive discussions among MHSAA's member schools. When surveyed by MHSAA in 1973 about the best time to schedule a girls' basketball tournament, 72% of member schools voted for fall, and MHSAA scheduled the tournament to match its members' stated preferences. CAJA 3281. MHSAA has polled its member schools repeatedly about the season schedules and each time, without exception, the members responded by overwhelmingly favoring the current schedules. See CAJA 3281, 3314, 3302, 3289. In 1979, 90.2% of responding schools voted to keep girls' basketball in the fall. In 1981, 88% reaffirmed those preferences. CAJA 3289. In 1985, 88.5% of member schools preferred separate seasons for boys and girls in basketball. CAJA 3289. And coaches surveyed in 2001 voted overwhelmingly to retain the fall season for girls' basketball. CAJA 3724-25, 4240. The survey numbers are similarly compelling in other sports. The record established, and the decisions below assumed, that MHSAA's schedules were designed in good faith with no intent to disadvantage girls. Pet. App. 144a-145a, 29a-30a.

Although the particular seasons chosen in Michigan, for both girls and boys, do not uniformly conform to the season in which that sport is traditionally played at the college level, Michigan is hardly alone. Like Michigan, 18 other

states schedule girls' golf in spring, 16 schedule girls' swimming and diving in fall, 20 schedule girls' tennis in fall, and 21 schedule girls' soccer in spring. At the professional level, the WNBA has elected to play during the summer rather than simultaneous with the fall-to-spring NBA season. The NCAA similarly uses different seasons for men's and women's volleyball and water polo. And the seasons chosen by MHSAA's member schools have been very successful at promoting participation in girls' athletics. Although Michigan ranks 8th nationwide in overall population as well as population of 14- to 17-year-old girls, it ranks 5th in total student athletes, 4th in girls' participation, and in the top five in numerous individual girls' sports.[2]

Proceedings In The Trial Court

1. Respondents represent a certified class of female high school athletes in Michigan. The gravamen of their complaint is that MHSAA schedules six selected girls' sports (basketball, volleyball, soccer, Lower Peninsula golf, Lower Peninsula swimming and diving, and tennis) in "disadvantageous" seasons—either a "nontraditional" season (as measured by collegiate seasons), or a "traditional" season which is nonetheless less favorable, in plaintiffs' opinion, than the season used by either Michigan's boys or by girls in certain other states. Plaintiffs allege that these "disadvantages" violate Title IX of the 1972 Education Amendments, 20 U.S.C. §§ 1681 *et seq.* ("Title IX"), the Equal Protection Clause as enforced through 42 U.S.C. § 1983, and Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101, which the courts below held is co-extensive with the Equal Protection Clause. Pet. App. 162a, 33a-35a. Plaintiffs have never challenged the original decision to have separate sports teams for boys and girls.

MHSAA responded that the seasons were selected by the schools themselves for legitimate logistical reasons relating to the availability of facilities, coaches, and officials.

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[2] Annual participation figures are collected at http://www.nfhs.org.

MHSAA also argued that its current scheduling was the product of good faith decisions intended to maximize participation rates, promote the independent identity and significance of girls' sports, increase the attention paid to girls' teams by student bodies and the media, and respect the preferences of member schools and many of the girls themselves. It offered evidence concerning its decision-making process, survey results from years of discussions with member schools, and testimony of prominent girls' coaches supporting its approach.

2. The district court concluded that respondents were not required to prove that the selection of these six seasons was motivated by discriminatory animus. It held instead that under *United States v. Virginia*, 518 U.S. 515 (1996) (*"VMI"*), MHSAA bore the burden to show an "exceedingly persuasive" justification for any decision to schedule boys' and girls' tournaments in different seasons—*i.e.*, that its "classification between the sexes in scheduling sports' seasons serves important governmental objectives and that this scheduling is substantially related to the achievement of those objectives." Pet. App. 146a. It held that "MHSAA chose to rely on anecdotal and weak circumstantial evidence," and had not carried that burden. *Id.* at 147a. It also found that the girls' seasons chosen for these six sports were "disadvantageous" compared to the boys' seasons or to the seasons used for girls in other states. The district court ruled that the same scheduling also violated Title IX and Michigan's civil rights statute. It ordered injunctive relief.[3]

The "disadvantages" described by the district court are highly debatable, frequently of concern to very few athletes, and often produced by scheduling decisions by outside

[3] Under that injunction, girls' basketball and volleyball would switch, with basketball moving to winter and volleyball to fall. The golf and tennis seasons in the Lower Peninsula would switch, with boys' golf and girls' tennis moving from fall to spring; and girls' golf and boys' tennis moving from spring to fall. In the Upper Peninsula, soccer tournaments would be offered in the fall for girls, and in the spring for boys.

actors such as Nike, professional teams, or the NCAA.

Basketball. The district court found that Michigan girls playing basketball in fall "cannot participate in special events for professional or semi-professional teams, such as playing before or at half-time of a professional game," or in "national shoot-outs such as the Nike and Blue Star shootouts." Pet. App. 90a, 93a. There was no evidence that MHSAA even took these third-party scheduling decisions into account when selecting the boys' seasons, yet it was found to violate the constitution by failing to make them paramount for the girls. The district court also found that Michigan girls "do not get to participate in 'March Madness' or the excitement and publicity surrounding this time period," *id.* at 90a, and are less likely to make the Parade All-American lists that come out in March, because "'everybody's forgotten about you.'" *Id.* at 92a.[4]

The district court discounted testimony from the University of Michigan head women's basketball coach, who testified that the fall season is actually a substantial recruiting *advantage* for Michigan girls because college coaches can attend as many high school games as they like before the beginning of October. *Id.* at 94a. It is also more convenient for college coaches to visit high schools during the fall, because their own teams have not begun practicing. *Id.* The district court concluded, however, that MHSAA had provided "only circumstantial evidence that Michigan girls playing in winter would not be recruited at the same level that the MHSAA asserts they are in the fall," and that in any event, "moving girls' basketball to the traditional winter season would still give girls exactly equal opportunity to be recruited for collegiate play as boys' basketball players." *Id.* at 88a-89a.

Volleyball. MHSAA scheduled the girls' volleyball

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[4] The district court conceded that Michigan girls were still eligible for the All-American list, but stated that "MHSAA did not ... provide any evidence that suggested that the ability to be ranked was not influenced by the fall playing season." *Id.* at 92a-493a.

tournament in the winter instead of the fall because (as plaintiffs themselves have insisted) there is a shortage of winter sports for girls. That schedule has been highly successful. Winter volleyball attracts more participants than any other girls' sport. Pet. App. 97a.

Volleyball is not offered for Michigan boys, but the district court found that the winter season "disadvantages" plaintiffs *in comparison to girls in other states* who play volleyball in the fall. The court reasoned that college recruiting for girls' volleyball principally focuses on private club programs rather than interscholastic competition, and, because of conflicts with the Michigan schedules, Michigan girls are less highly seeded in private club tournaments and are named to All-American teams and national rankings less often than girls from other states. Pet. App. 99a-105a.

The district court acknowledged MHSAA's evidence that girls benefit from playing both basketball and volleyball, but again concluded that MHSAA had not carried its burden of proof because it "presented no evidence to indicate why" any facilities conflicts could not be solved if the volleyball season "were to be switched with girls' basketball." *Id.* at 106a. The court similarly recognized that "MHSAA is correct that Michigan girls and their high school coaches have had success in volleyball in which the entire state can take pride," but concluded that "MHSAA failed to prove whether this indicates that the winter, non-traditional volleyball season is not a disadvantage ...." *Id.*

Virtually all of plaintiffs' non-party witnesses at trial were volleyball coaches. Thus, the centerpiece of plaintiffs' evidence of "disparate treatment" concerned the scheduling of a sport that Michigan boys are not even given the opportunity to play. CAJA 3621, 3663, 3782, 3872, 3897.

Soccer. Michigan girls play soccer in the spring, and the boys play in the fall. The court acknowledged that there is not "one clear season in which high school girls play in soccer across the nation," and that 22 states schedule girls' soccer in the spring. Pet. App. 107a & n.30. Nonetheless it

concluded that the spring schedule is disadvantageous because sometimes the fields are frozen when the season begins, which can force more frequent make-up games and increase the risk of injury. *Id.* at 108a-109a. It also found that private club and amateur programs generally take place in the spring, and that Michigan girls thus must choose between outside leagues and interscholastic competition. *Id.* at 110a. Michigan girls also may not have been seen by college recruiters in their senior year before the first round of scholarships are awarded in November. *Id.* at 109a-110a. The court also found that MHSAA failed to carry its burden of proving that the spring schedule did not hurt Michigan girls in the "All-American" rankings. *Id.* at 110a-111a.

The district court acknowledged that the spring schedule has some advantages. Girls can play soccer on Friday nights in the spring, while the boys cannot in the fall because of football. *Id.* at 111a. There are more experienced officials available in the spring, because colleges play soccer in the fall. *Id.* A combined season could be difficult because a third of high school coaches in Michigan coach both the boys' and girls' teams, and because "[t]he quality of the surfaces of soccer fields will ... decline with twice as many players on them." *Id.* at 111a-112a. But the district court again held that MHSAA had simply failed to carry its burden of proof. *Id.* at 107a, 112a.

Lower Peninsula Golf. Some, but not all, of Michigan's girls' golf teams play in the spring—which is the traditional season for golf, the season the NCAA uses, and the season in which all Michigan boys played until the 1970s. The district court nonetheless found that the spring is disadvantageous because the courses are in poorer condition and girls must compete for tee times with more members of the public. Pet. App. 113a-114a. It also noted that college letters of intent are traditionally signed in November, and some Michigan girls have not yet played their senior season by then. Boys, playing in the fall, also go straight from summer play into their season, while girls must rebuild their skills after the winter break. *Id.* at 114a.

The court acknowledged MHSAA's point that the longer daylight hours in the spring make it "easier to play eighteen holes of golf without missing school," but found that did not "make[] up for the other disadvantages of the spring golfing season." *Id.* at 115a. Once again, it held MHSAA had failed to carry its burden of proof: "No significant evidence was introduced ... that logistics would make maintaining both the girls' team and the boys' team in the same Lower Peninsula golf season difficult or impossible." *Id.*

Lower Peninsula Swimming. The Michigan girls' Lower Peninsula swimming and diving season is in the fall, and the boys swim in the winter. The district court found that the winter season was better because private club tournaments take place in winter so boys can go directly from their season to club tournaments while girls have a gap. National and amateur swim meets also take place in the spring, so girls face a larger gap between their season and the tournaments. Pet. App. 117a-118a. The winter season is also two weeks longer. *Id.* at 118a. On the other hand, the court recognized that fall allows girls to transition smoothly from *summer* swimming and has fewer interruptions like exams, the winter holidays, and spring break. *Id.* at 119a. It also acknowledged MHSAA's proof that "high school swimming programs in Michigan are flourishing for girls, but declining for boys." *Id.*

The district court held that MHSAA had not carried its burden of proving a need for separate seasons. Although it acknowledged that one third of Michigan swimming coaches coach both girls and boys, *id.* at 119a, the court held that "the anecdotal evidence presented of logistical problems was insufficient to prove logistical problems would occur if both sexes swam in the same season." *Id.* at 115a. And "[i]f logistical problems would exist, there was also insufficient evidence that those problems would not have solutions." *Id.*

Tennis. The court concluded that the boys' spring season for tennis is better than the girls' fall season. The fall season is approximately 20 days shorter than the spring. Pet. App. 121a. The spring season immediately precedes

the U.S. Tennis Association's tournament circuit, so boys have played more immediately before that circuit than girls. *Id.* (Of course, the district court thought that *following* summer play was an unfair advantage for boys in golf).

Proceedings On Appeal

On initial appeal, the Sixth Circuit adopted the district court's findings, and affirmed. The Sixth Circuit agreed with the district court that "scheduling team sports in different seasons based on gender" was a facial gender classification, and that the burden was therefore on MHSAA to show an "exceedingly persuasive" justification—*i.e.*, that its scheduling decisions were substantially related to achieving an important government objective. *Id.* at 63a. It held that MHSAA had not met that burden. *Id.* at 64a. The Sixth Circuit also squarely rejected MHSAA's argument that plaintiffs were required to prove discriminatory animus. "Disparate treatment based upon facially gender-based classifications evidences an intent to treat the two groups differently. *VMI* imposes no requirement upon [plaintiffs] to show that an evil, discriminatory motive animated MHSAA's scheduling of different athletic seasons for boys and girls." *Id.* at 65a. It declined to consider the claims under Title IX or the Michigan statute because the Equal Protection ruling sufficed to affirm the injunction.

MHSAA petitioned this Court for certiorari. MHSAA first argued that once a classification by sex is conceded to be legal, good faith decisions implementing that classification should not once again be characterized as gender classifications. MHSAA's seasonal schedules do not classify anyone, and any disparate impact on girls resulting from such schedules is unconstitutional only if the plaintiffs prove discriminatory intent. MHSAA noted that other circuits had properly placed the burden on the plaintiffs in such circumstances, and that respondents had not even attempted to satisfy that burden (and could not).

Second, MHSAA pointed to an acknowledged three-to-three circuit split on whether Title IX's comprehensive

remedial regime preempts parallel gender discrimination claims brought under § 1983. This Court explained in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 20 (1981) ("*Sea Clammers*"), that when Congress enacts a comprehensive statutory regime that provides adequate protections for certain rights, Congress may intend to preclude similar claims under § 1983. The Second, Third, and Seventh Circuits have all ruled that Title IX's comprehensive regime of remedies precludes a plaintiff from bringing a constitutional claim under § 1983 based on the same facts. The Sixth, Eighth, and Tenth Circuits have each held the opposite, establishing a square and acknowledged split.

This Court GVR'd in light of *Rancho Palos Verdes*, a recent decision applying the *Sea Clammers* doctrine. On remand, the Sixth Circuit readopted its original reasoning. It first reaffirmed its circuit precedent that Title IX does not preclude parallel Equal Protection claims enforced through § 1983. It concluded that Title IX "contains no comprehensive enforcement scheme" sufficient to displace § 1983 because "the only enforcement mechanism expressly authorized in Title IX is the withdrawal of federal funds." Pet. App. 14a. The court held that the private right of action this Court recognized in *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), is irrelevant to determining Congress's intent, because it is not expressly contained in the statute.

The court of appeals again concluded that the scheduling decisions were "facially gender-based classifications." Pet. App. 29a. It held that "the issue is not whether *any* difference between male and female high school sports is deserving of being classified as a case of disparate treatment. Rather, the issue is whether the seasonal scheduling differences on the basis of gender that *result in unequal treatment* of women in comparison to men is considered disparate treatment." *Id.* at 30a. It held that "MHSAA has failed to satisfy its burden of justifying its discriminatory scheduling practices under *V.M.I.*" *Id.*

Finally, the court of appeals also "agree[d] with the

district court that proof of a discriminatory motive is not required for a Title IX claim based on disparate treatment," and upheld the district court's decision that MHSAA was in violation of Michigan's Elliott-Larsen Act. Pet. App. 33a.

Judge Kennedy dissented in part. She would have held that the private right of action under Title IX is sufficiently comprehensive to evidence Congress's intent that it be the exclusive remedy in these circumstances. Pet. App. 38a.

REASONS FOR GRANTING THE WRIT

This case presents this Court with an opportunity to resolve a conflict among the circuits that is profoundly important to the administration of single-sex programs. As this Court recognized in *VMI*, separate programs or facilities will never be precisely identical. Even if the women's leadership program at Mary Baldwin College that Virginia proffered as an alternative to VMI had been substantially equal in resources, facilities, and programs, it would still have been located in Staunton, not Lexington. The layout of the campus would have been different. Its faculty would have been weaker in some subjects, and stronger in others. And the menu served by its cafeteria would not have been the same, day to day, as the food served at VMI. None of those differences would have been the result of a decision that overtly segregated by gender.

Similarly, the separate girls' teams in this case will inevitably play at different times, on different fields, with different equipment, and under different rules than the boys' teams do. Indeed, they frequently play entirely different sports (volleyball instead of football, for example). Even if plaintiffs succeed in moving the Michigan girls' basketball season to the winter, school principals will still have to decide what night and time to schedule the girls' and boys' games, and when to give each team use of practice courts, the school's weight room, or a particular coach that both would prefer. Indeed, consolidating girls and boys into the same season in every sport would greatly exacerbate such resource conflicts. To make a constitutional case out of

such differences, plaintiffs must prove intentional discrimination, *i.e.*, that the decisionmaker chose to give the girls' basketball team the Tuesday practice time or the less experienced coach *because they are girls*. Or, plaintiffs might try to prove that the separate athletic programs for boys and girls are substantially unequal overall, like the educational programs considered by this Court in *VMI*.

Respondents proved neither. The Sixth Circuit instead shifted the burden of proof and held that intentional discrimination must be *presumed* here, because MHSAA's schedules are somehow a "facial classification." Pet. App. 30a. That is a serious error. The only facial classification here is Michigan's decision to have separate sports teams for boys and girls. Once that separation is in place, scheduling particular athletic contests "classifies" students, if at all, only as members of particular teams. Such decisions have a *disparate impact* by gender because of the pre-existing composition of the teams. But that is no reason to presume intentional discrimination.

The Sixth Circuit's holding conflicts with this Court's decision in *VMI*, and with decisions of the Third, Fourth, Eighth, and D.C. Circuits—all of which have recognized that differences in implementation between separate male and female programs are not themselves facial classifications, and are not presumptively unconstitutional. If every difference that creates an arguable disadvantage is treated as a separate, facial gender classification requiring an "exceedingly persuasive justification," the ensuing litigation will be endless and separate facilities or programs—athletic teams, schools, prisons, even bathrooms—will, for all practical purposes, become unconstitutional.

For the same reason, the Sixth Circuit's Title IX ruling is wrong as a matter of law because plaintiffs have not proven intentional "discrimination" "on the basis of sex." 20 U.S.C. § 1681(a). The Sixth Circuit presumed intentional discrimination and therefore found a Title IX violation without requiring any proof from the plaintiffs. That decision squarely conflicts with decisions of other circuits.

In addition, this case presents this Court with an opportunity to resolve a separate, longstanding circuit split over whether the comprehensive remedies created by Title IX preempt athletic gender discrimination claims brought under § 1983. In *Rancho Palos Verdes*, this Court clarified that the "ordinary inference" from the existence of a private right of action under a statute is that Congress intends that remedy to displace § 1983. 544 U.S. at 122. The Sixth Circuit, along with the Eighth and Tenth Circuits, continue to insist that the private right of action to enforce Title IX recognized by this Court in *Cannon* is irrelevant because it is not expressly contained in the statute. That conflicts with decisions of the Second, Third, and Seventh Circuits.

I. THE SIXTH CIRCUIT PRESUMED INTENTIONAL DISCRIMINATION IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

A. Differences In Single-Sex Programs Are Constitutional Unless The Plaintiff Proves Discriminatory Animus, Or That The Programs Are Substantially Unequal Overall

This Court has indicated that separate facilities for men and women will sometimes satisfy intermediate scrutiny.[5] Separate facilities must of course be substantially equal, but need not be identical. Both the Fourth Circuit majority and dissent in *VMI* agreed that the test was whether the two programs "afford[ed] to both genders benefits comparable in substance, but not in form and detail." *United States v. Virginia*, 44 F.3d 1229, 1240 (4th Cir. 1995); *cf. id.* at 1250 (Phillips, J., dissenting) (arguing that single-sex schools must have "substantially comparable curricular and extra-

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[5] Even in *VMI*, this Court "d[id] not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities," including single-gender schools. 518 U.S. at 533 n.7. And it acknowledged that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." *Id.* at 550 n.19.

curricular programs, funding, physical plant, administration and support services, and faculty and library resources"). In reversing, this Court cited with approval both Judge Phillips's "substantially comparable" formulation and the "substantial equality" or "substantially equivalent" test that it had applied in *Sweatt v. Painter*, 339 U.S. 629 (1950). *See VMI*, 518 U.S. at 547 n.17, 553-54; *see also id.* at 563-65 (Rehnquist, C.J., concurring) (equal protection does not require identical schools, but merely "two institutions [that] offered the same quality of education and were of the same overall caliber"). This Court held that "Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI." *Id.* at 554. It pointedly *did not* hold that every difference must satisfy intermediate scrutiny.

Particular differences are unconstitutional only if they represent intentional discrimination. As this Court has explained, "'discriminatory purpose'" "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (citation omitted). Laws or policies that "classify" persons by race or sex *on their face* give rise to a presumption of discriminatory purpose. But in the absence of a facial classification, intent must be proven.

B. The Scheduling Decisions Challenged Here Are Not Facial Gender Classifications

The Sixth Circuit held that MHSAA's schedules are a "facial classification," and that therefore discriminatory intent may be presumed. That is wrong as a matter of law.

Plaintiffs do not challenge the only true facial classification at work in this case: the original decision to have separate high school sports teams for boys and girls. Because of the "enduring" physical differences between men and women, *VMI*, 518 U.S. at 533, separate teams are

essential to any meaningful pursuit of equal athletic opportunities. But once the need for separate programs is conceded, administrators must make a host of implementing decisions—such as what sports they will play, when the teams will play, when they will have access to the weight room, or who their coach will be. A high school principal "classifies" students according to gender if she decrees that the school will have separate boys' and girls' soccer teams. But simply purchasing new uniforms for the girls' team but not the boys' is not a facial classification, and may have nothing to do with sex. The boys must actually prove they were denied new uniforms *because they are boys.*

Similarly, a decision to hold the girls' basketball tournament in December does not classify anyone by sex, any more than holding that tournament in March (plaintiffs' preferred alternative) would. These are simply dates on a calendar, like the lines on a map considered in *Shaw v. Reno*, 509 U.S. 630 (1993). This Court explained in *Shaw* that a districting statute "typically does not classify persons at all; it classifies tracts of land, or addresses." 509 U.S. at 646. The decisions challenged here similarly classify athletic contests—or, at most, members of particular sports teams. The fact that all the members of some teams are of one gender does not make the choice of a tournament date into a facial gender classification, especially since the same scheduling choice would have to be made if the teams were of mixed genders. Likewise, discrimination against pregnancy in insurance plans is not a facial gender classification even though only women become pregnant, *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974), civil service preferences for veterans are not facial classifications even if veterans are overwhelmingly men, *Feeney*, 442 U.S. at 274, and firing employees because their pension is about to vest is not age discrimination even though nearly all employees in that position are older, *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). The only exception is if the lines are "so bizarre as to permit of no other conclusion" than discrimination. *Shaw*, 509 U.S. at 646. Respondents have

never alleged, and no court has ever found, that MHSAA's scheduling decisions are so bizarre and unexplainable on other grounds that they must have been motivated by discriminatory intent. "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Hazen Paper*, 507 U.S. at 610.

The Sixth Circuit tried to limit the breadth of its ruling by insisting that "the issue is not whether *any* difference between male and female high school sports is deserving of being classified as a case of disparate treatment. Rather, the issue is whether the seasonal scheduling differences on the basis of gender that *result in unequal treatment* of women in comparison to men is considered disparate treatment." Pet. App. 30a. That misses the point and supplies no limiting principle at all. As this case demonstrates, any difference can be said to create a "disadvantage" or "result in unequal treatment" in the eyes of one side or another. The relevant question is whether that disadvantage was intentionally assigned to one group *because of its sex*. The Sixth Circuit's standard does not address that question at all. Some disappointments are simply inevitable. A school with only one experienced basketball coach may be forced to choose between having him coach the girls' team or the boys' team, or maybe both but only if they play in separate seasons. Under the Sixth Circuit's analysis, the school will have engaged in intentional gender discrimination no matter what it decides, and must provide an "exceedingly persuasive justification" for a decision that might have been based on a coin flip.

Plaintiffs therefore had to prove that the challenged scheduling decisions were in fact motivated by discriminatory animus (*i.e.*, that these dates were chosen at least in part "because of," not merely "in spite of," the gender composition of the teams). Alternatively, plaintiffs might have attempted to satisfy their burden by demonstrating that the separate athletic programs that

Michigan high schools sponsor for girls and boys are not "substantially equal" under *VMI*.[6] Plaintiffs did neither. Instead, the district court and the Sixth Circuit improperly relieved them of those burdens by treating every decision implementing a program that happens to be single-sex as a facial classification, shifting the burden of proof to MHSAA. That approach is an invitation to constitutional litigation over every detail of how single-sex programs are implemented. For example, different school buses or uniforms for boys' and girls' teams, different sites for boys' and girls' schools, and different educational offerings at male and female prisons are all presumptively unconstitutional in the Sixth Circuit if anyone thinks those differences result in unequal treatment. The courts below even presumed discrimination from the fact that MHSAA's girls' volleyball schedule differs from that used by *girls in other states*.

Despite years of discovery, dozens of depositions, and MHSAA's production of more than 100,000 documents, respondents did not remotely develop evidence sufficient to support a ruling in their favor under a proper legal standard, and judgment should have been entered for MHSAA. Respondents made no effort to articulate a meaningful conception of what "substantial equality" in overall athletic offerings would mean, or to evaluate whether Michigan's offerings satisfied it. The district court's conclusion that girls received "all of the disadvantageous playing seasons" *among the six sports that plaintiffs chose to focus on*, Pet. App. 147a, certainly is not equivalent to a finding that the overall athletic offerings were not substantially equal. Michigan girls have the opportunity to participate in tournaments in 18 sports, while boys have only 14. CAJA 2004. Respondents claim a "disadvantage" as to just 6 of the 18 sports. And many of

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[6] *VMI* held that a facial classification establishing separate programs was not justified because the programs were substantially unequal. Plaintiffs have never even attempted such a challenge. They concede that the classifications establishing separate programs here are constitutional.

the "advantages" the district court identified in the boys' seasons are enjoyed by *girls* in other sports.[7] There could be no finding of overall inequality on these facts.

Plaintiffs also presented no evidence that would support a finding that MHSAA adopted these particular schedules "because of," not merely "in spite of," any perceived disadvantages to its female athletes. Indeed, plaintiffs' *only* argument regarding intent has been that they need not prove anything because animus should be presumed. Plaintiffs have never genuinely contended that MHSAA was motivated by an actual desire to disadvantage girls. MHSAA vigorously disputed plaintiffs' contention that the supposed "disadvantages" exist at all. MHSAA sincerely believes that the challenged schedules are tangibly *better* for girls overall than the alternatives proffered by plaintiffs. The district court disagreed (after a wide-ranging foray into athletic policy-making disguised as constitutional law), but did not find that MHSAA was motivated by gender animus.

Nor can an inference of discriminatory animus be sustained on the basis of evidence that MHSAA sought to avoid unnecessary disruption of pre-existing boys' tournament schedules when it began adding new tournaments for girls in 1972. Sports were added over time based on the order they emerged, not the gender of the players. Plaintiffs never offered any proof that MHSAA made those initial choices *because of, not merely in spite of* any adverse impact on girls. To the contrary, the very evidence plaintiffs offered to show that MHSAA scheduled the girls' tournaments around the pre-existing boy's tournaments included MHSAA's explanation that the original girls' schedule "allowed for the best use of facilities,

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[7] The court found that girls are "disadvantaged" because their basketball, swimming and diving, and tennis seasons are shorter. But the girls have longer seasons in golf and soccer. Pet. App. 107a-108a, 112a-113a. The court thought it an advantage that the spring tennis season for boys flows naturally into summer club play. *Id.* at 121a. But the girls' fall seasons in tennis and basketball follow right *after* summer play, which the district court held was an advantage for boys' golf. *Id.* at 114a.

faculty, and officials." CAJA 2882. One witness testified that MHSAA council members told her in 1973 that "one important consideration" for having girls' basketball in fall "would be that facilities would not be as taxed." CAJA 4039. An effort to maximize the use of resources, and thus participation, while avoiding unnecessary disruption of the entire program each time a sport was added—again, gender neutral—does not support an inference of bias.

It also bears emphasis that the evidence established that many coaches, parents, and athletic directors, who were not alleged to harbor gender animus, shared MHSAA's view that the current schedule represents the best alternative for the greatest number of female athletes. Examples abound. A survey of Michigan female athletes in 1999 established that fewer than one-third thought girls and boys teams should play in the same season. CAJA 4476-78, 3344. The University of Michigan women's basketball coach testified that the current girls' schedule was "more convenient" for recruiting and provided "more visibility for Michigan's girls to be recruited." CAJA 163. Several girls' coaches testified that "the girls programs are flourishing a lot more than the boys," CAJA 4646, the "current alignment of seasons allows us to have two to three times more matches than most other states," CAJA 4513, and "in the 13 years I've been coaching the girls, the participation for girls has more than doubled." CAJA 4604. Kathy Lindahl, former associate athletic director at Michigan State, testified that she had "a passion for girls and women in sport," and had "dedicated basically my whole career and life to providing those opportunities for girls and women in sports," and believed that MHSAA's current schedules provide "an advantage" for all students. CAJA 4435-36. And a great many of the "disadvantages" the district court saw in the current schedules relate to private club competition, Nike shoot-outs, All-American rankings, and other concerns that affect only a few elite athletes and that are far removed from the core educational goals of MHSAA's member schools. The evidence establishing a good faith disagreement forecloses any

presumption that any perceived disadvantages simply *must* be a product of intentional discrimination. *See, e.g., Villanueva v. Wellesley College*, 930 F.2d 124, 132 (1st Cir. 1991) (by showing a good faith dispute over the wisdom of its actions, defendant "has successfully dispelled any inference of discrimination").

C. The Sixth Circuit's Holding Conflicts With Decisions Of Other Circuits

The Sixth Circuit's opinion conflicts with decisions of the Third, Fourth, Eighth, and D.C. Circuits.

The court's reasoning conflicts with the Fourth Circuit's decision in *VMI* for reasons discussed briefly above. Both the majority and dissent agreed in *VMI* that the issue was whether the overall educational experience offered by VWIL was substantially equal to VMI. Neither treated particular differences between the two programs as presumptively unconstitutional facial gender classifications. Although this Court reversed the Fourth Circuit's conclusion that VWIL *was* substantially equal, it framed the issue similarly—and cited both Judge Phillips's Fourth Circuit dissent and a similar formulation from *Sweatt* with approval. *See VMI*, 518 U.S. at 547 n.17, 553-54.

For similar reasons, this case conflicts with the Third Circuit's decision in *Vorchheimer v. School District*, 532 F.2d 880, 882 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977), which upheld the constitutionality of separate male and female public high schools that were "similar and of equal quality," although different in some respects. (The district court had held "'that [generally] the education available to the female students ... is comparable,'" although the "academic facilities ... in the scientific field ... are superior" at the boys' school. *Id.* (first alteration in original).) *Vorchheimer* applied intermediate scrutiny in the alternative. *Id.* at 888.

The Sixth Circuit's reasoning also conflicts with a line of cases from the Eighth and D.C. Circuits evaluating differences between men's and women's prisons. In *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994),

cert. denied, 513 U.S. 1185 (1995), a class of female inmates sued Nebraska alleging that its women-only prison offered inferior vocational, educational, and employment opportunities, rehabilitation programs, and medical and psychological services compared to its men-only prisons. The district court held that Nebraska bore the burden of justifying any differences under intermediate scrutiny. Reversing, the Eighth Circuit majority pinpointed precisely the error committed by the Sixth Circuit in this case:

> The dissent and the district court both erroneously assume that this is a case involving a facial gender classification. There is simply no Nebraska statute or policy that distinguishes on its face between men and women as to prison programs. ... There is of course a facial classification in Nebraska prisons in that male and female inmates are segregated by institution, with the exception of the two integrated institutions. The plaintiffs, however, do not challenge this classification. The dissent and the district court apparently reason that if women are sent to [the women's prison] because of their sex that the programs they receive are necessarily based on their sex.
>
> ... [D]etermining whether the plaintiffs receive inferior programs because of their sex or for some other reason requires looking beyond the fact that female prisoners are segregated from men and examining the reasons behind the defendants' programming decisions.

31 F.3d at 734. The Eighth Circuit recognized that "female inmates can always point out certain ways in which male prisons are 'better' than theirs, just as male inmates can always point out other ways in which female prisons are 'better' than theirs." *Id.* at 732. That does not mean, however, that such differences are necessarily the result of intentional sex discrimination. *Id.* at 733. The Eighth Circuit held that the district court's analysis improperly

"shifted the burden to the defendants to justify differences in prison programming," which "effectively relieved the plaintiffs of their burden of persuasion on the ultimate issue of discriminatory purpose." *Id.* at 734.

The Eighth Circuit revisited this issue in *Keevan v. Smith*, 100 F.3d 644 (8th Cir. 1996), which challenged the placement of particular prison industries resulting in, *inter alia*, 21 enterprises at men's prisons and only 3 at women's prisons. The court acknowledged that the mix was different for men's and women's prisons, but held that the provision of particular opportunities is facially neutral and refused to presume intentional discrimination. As in *Klinger*, "the women prisoners do not challenge the Department policy of segregating male and female prisoners by gender. Rather they challenge the Department policy which determines the placement of a particular prison industry at a specific penal facility." 100 F.3d at 650. The Eighth Circuit ruled that such decisions are not facial classifications, and that "it is appellants' burden to establish that the adverse effect this Department policy has on women inmates is the result of a discriminatory purpose." *Id.* at 651.

In *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997), the D.C. Circuit confronted a similar challenge to differences between men's and women's prisons. Plaintiffs alleged that the men's prisons included more work details, prison industries, and recreation opportunities. 93 F.3d at 915-16. The D.C. Circuit noted that "the segregation of inmates by sex is unquestionably constitutional," and that plaintiffs had "not alleged that the District allocates fewer resources per female inmate." *Id.* at 926. Instead, they were "inviting this court to find that the District's decision to provide male (but not female) inmates with access to any particular program violates equal protection principles." *Id.* The D.C. Circuit recognized that, under that reasoning, "any divergence from an identity of programs gives rise to equal protection liability." *Id.* It rejected that "program-by-program

method of comparison," citing *Klinger* and *VMI*.[8]

The Sixth Circuit committed precisely the error that the Eighth and D.C. Circuits reversed in the prison cases, and that the Third and Fourth Circuits avoided in *Vorchheimer* and *VMI*: it wrongly presumed that any differences between separate male and female programs were the result of facial gender discrimination. If this case had arisen in the Third, Fourth, Eighth, or D.C. Circuits, the court would have placed the burden on plaintiffs to prove an actual discriminatory purpose or true overall inequality, and MHSAA would have prevailed.

D. The Title IX Ruling Conflicts With Decisions Of Other Circuits

The Sixth Circuit's analysis under Title IX parallels its Equal Protection reasoning: if MHSAA's schedules "disadvantage" girls, then intentional discrimination (and thus a violation of Title IX) may be presumed. Pet. App. 32a.[9] That reasoning conflicts with decisions of other circuits under Title IX as well as its sister statute, Title VI.

In *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000), the Fifth Circuit analyzed a claim under Title IX that LSU's decision not to create women's teams in soccer and fast-pitch softball was intentional discrimination. Even though LSU had a men's soccer program and a men's baseball program, the Fifth Circuit did not (like the Sixth

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[8] The Eighth Circuit and D.C. Circuit cases also held that the male and female prisoners were not similarly situated, but their discussions of the discriminatory purpose issue are alternative holdings, not dicta. *See Klinger*, 31 F.3d at 733 ("Even assuming the inmates are similarly situated, however, that is merely the beginning of the analysis."); *Keevan*, 100 F.3d at 650 ("Even assuming, for the sake of argument, that male and female inmates were similarly situated ..., an equal protection review ... requires further analysis."); *Women Prisoners*, 93 F.3d at 926 ("our decision here is altogether consistent with the Supreme Court's most recent articulation of equal protection principles in [*VMI*].").

[9] The district court in this case correctly dismissed all Title IX "disparate impact" claims pursuant to *Alexander v. Sandoval*, 532 U.S. 275 (2001). CAJA 935. Plaintiffs did not appeal that ruling.

Circuit here) simply assume that any disadvantageous difference between the men's and women's programs was a "facial classification" and therefore automatically intentional discrimination. Instead it closely examined the evidence for *why* LSU had not created women's programs in those sports, and concluded that the reason was "paternalism," "antiquated stereotypes," and archaic "assumptions about [women's] interests and abilities." 213 F.3d at 880-82. Indeed, LSU had "not even attempted to offer a legitimate, nondiscriminatory explanation for this blatantly differential treatment of male and female athletes, and men's and women's athletics in general; they merely urge that 'archaic' values do not equate to intentional discrimination." *Id.* at 881. The Fifth Circuit concluded that "[o]ur review of the record convinces us that an intent to discriminate, albeit one motivated by chauvinist notions as opposed to one fueled by enmity, drove LSU's decisions regarding athletic opportunities for its female students." *Id.* at 882.

The Sixth Circuit's reasoning in this case would render that entire inquiry into the *reasons* for LSU's "differential treatment" unnecessary, by simply presuming that any difference that can be characterized as a "disadvantage" is a facial classification and hence conclusive proof of intentional discrimination. The Fifth Circuit would have examined the evidence for why MHSAA selected the schedules it did, and would have concluded that good faith disagreement over which schedules are best for female athletes, and a desire to maximize participation and minimize resource conflicts, are not archaic stereotypes or any other form of discrimination. A schedule designed to maximize overall participation is virtually the hallmark of Title IX compliance, even if it is less than optimal for a few elite athletes like plaintiffs here.

Title IX cases are rarely litigated as straight intentional discrimination claims, but many courts have addressed the meaning of intentional discrimination under Title VI—which was the model for Title IX and is very similar in structure. *See Cannon*, 441 U.S. at 694 ("Title IX was patterned after Title VI"). Those courts have consistently held that Title VI

plaintiffs must prove that the challenged conduct was undertaken "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pryor v. NCAA*, 288 F.3d 548, 562 (3d Cir. 2002), quoting *Feeney*, 442 U.S. at 279; *Peters v. Jenney*, 327 F.3d 307, 321 n.18 (4th Cir. 2003). That principle is inconsistent with the Sixth Circuit's reasoning, for reasons explained above.

II. THIS COURT SHOULD DETERMINE WHETHER TITLE IX'S COMPREHENSIVE REMEDIES PRECLUDE § 1983 CLAIMS

This case also provides the Court with the opportunity to resolve a longstanding and acknowledged circuit split over whether the use of § 1983 in this context is precluded by the comprehensive remedial scheme established in Title IX. The court of appeals reaffirmed its precedent that Title IX does not preclude under § 1983 remedies. That was clear legal error, and conflicts with the settled law of this Court and the Second, Third, and Seventh Circuits.

A. Congress Intended Title IX To Provide The Exclusive Remedies For Athletic Gender Equity Cases

Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). But if Congress has intended that another statutory scheme be the exclusive method for vindicating a right, plaintiffs must use that statute. *Sea Clammers* held that other statutes may preempt § 1983 "when the remedial devices provided in a particular Act are sufficiently comprehensive." 453 U.S. at 20. "The crucial consideration is what Congress intended." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984).

The crux of the circuit split, and of the Sixth Circuit's error, centers on the private right of action to enforce Title IX. The Sixth Circuit held that Title IX "contains no comprehensive enforcement scheme" sufficient to displace

§ 1983 because "the only enforcement mechanism expressly authorized in Title IX is the withdrawal of federal funds." Pet. App. 14a. It held that the private right of action this Court identified in *Cannon* is irrelevant to determining Congress' intent, because that private right is not expressly contained in the statute. *Id.* at 17a.

That is incorrect. As the Second, Third, and Seventh Circuits have properly held, *Sea Clammers* is about what Congress intended, and the holding of *Cannon* is that Congress intended to create a private right of action to enforce Title IX. This Court held in *Cannon* that "the history of Title IX rather plainly indicates that Congress intended to create such a [private] remedy," 441 U.S. at 694, and that "Congress itself understood Title VI, and thus its companion, Title IX, as creating a private remedy." *Id.* at 699. This Court inferred "an intent on [Congress'] part to have such a remedy available," *id.* at 717, even if Congress did not explicitly mention it in the statutory text. The Sixth Circuit's assumption that since the private remedy is not express Congress must not have intended it is simply inconsistent with *Cannon*.

Once Title IX's full panoply of private remedies is considered, Title IX clearly precludes parallel § 1983 claims. *Rancho Palos Verdes* confirmed that the "ordinary inference" from the existence of a private judicial remedy is that Congress intended it to be exclusive. 544 U.S. at 122. Indeed, this Court noted that when private remedies are available, it has *never* allowed parallel § 1983 claims. *Id.* Permitting § 1983 claims would circumvent important limitations on Title IX, such as its prohibition on punitive damages, *see Barnes v. Gorman*, 536 U.S. 181, 188-89 (2002), and its regulatory safe harbor provisions. *See, e.g.*, Title IX of the Education Amendments of 1972, A Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979). For example, a school with historically fewer opportunities for women need not have achieved a level of participation opportunities substantially proportionate to female enrollment, so long as the school can

show "a history and continuing practice of program expansion." *Id.* at 71,418. If § 1983 suits are allowed to circumvent Title IX, decades of reliance on compliance with Title IX will be threatened.

B. The Sixth Circuit's Holding Entrenches A Deep And Acknowledged Circuit Split

In 1996, the Sixth Circuit held in *Lillard v. Shelby County Board of Education*, 76 F.3d 716 (6th Cir. 1996), that Title IX did not preclude constitutional claims under § 1983. After this Court's decision to GVR in light of *Rancho Palos Verdes*, the Sixth Circuit reaffirmed *Lillard* and solidified the three-to-three circuit split.

The Eighth and Tenth Circuits agree with the Sixth Circuit, and both acknowledged the circuit split. *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997), *Seamons v. Snow*, 84 F.3d 1226, 1233-34 (10th Cir. 1996). Those Circuits, like the Sixth, refuse to give weight to the private remedies identified by this Court in *Cannon*. The Eighth Circuit focused on Title IX's remedial scheme and concluded that Title IX remedies were a "far cry from" the elaborate remedies in *Sea Clammers*. *Crawford*, 109 F.3d at 1284. The Tenth Circuit agreed that "Title IX does not have a 'comprehensive enforcement scheme,'" *Seamons*, 84 F.3d at 1234, quoting *Lillard*, 76 F.3d at 723. The Tenth Circuit also questioned whether a statute could "preempt independently existing constitutional rights." *Seamons*, 84 F.3d at 1233.

In contrast, the Third Circuit has held that Title IX's comprehensive remedies demonstrate Congressional intent to displace § 1983. *See Williams v. Sch. Dist.*, 998 F.2d 168, 176 (3d Cir. 1993); *see also Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990). Two other circuits have joined the Third. The Seventh Circuit examined the full range of private remedies under Title IX and held that

> [t]he provision of these remedies suggests that Congress saw Title IX as the device for redressing any grievance arising from a violation of federal civil rights by an educational institution. Through

> the establishment of this statutory regime, Congress effectively superseded a cause of action under § 1983 that was based on constitutional principles of equal protection.

Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 863 (7th Cir. 1996). The Second Circuit has likewise concluded that Title IX's "complex administrative enforcement scheme" and the private causes of action that give a Title IX plaintiff "access to a full panoply of remedies including equitable relief and compensatory damages" evince an intent by Congress to displace § 1983. *Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 756 (2d Cir. 1998). The Second Circuit also held that "nothing in *Sea Clammers* ... would support a constitutional rights exception." *Id.* at 757-58, citing *Smith*, 468 U.S. at 1011-12.

III. THIS CASE RAISES ISSUES OF NATIONAL IMPORTANCE

The questions presented by this case have broad significance to the educational community. Decisionmakers and lower courts must have guidance concerning the difference between a facial classification and implementing decisions in single-sex programs. The Sixth Circuit's holding that defendants must supply an "exceedingly persuasive justification" for every individual difference between such programs will subject school administrators (and athletic directors, coaches, prison officials, and anyone else administering gender-segregated facilities) to the constant threat of litigation for every decision they make. It is no longer enough to justify having separate teams or schools or prisons; the Sixth Circuit's opinion means that every subsequent difference is now presumptively unconstitutional, and must be justified by the state under heightened scrutiny. Separate programs cannot thrive in that legal environment. These issues have become especially important in view of the renewed interest in establishing single-sex educational options at the elementary and secondary school level, with the express

encouragement of the U.S. Department of Education.[10]

The Sixth Circuit's ruling also has the perverse result of reversing years of gender equity gains by undermining proven efforts to maximize resources and provide better athletic opportunities for all students. These concerns are not hypothetical: in the face of comparable litigation, North Dakota switched its girls' volleyball and basketball seasons (the principal relief sought here), and witnessed a 10.6% drop in girls' basketball participation and a 7% drop in volleyball participation. South Dakota switched, and saw a 13.1% drop in girls' basketball. Montana switched, and observed a 10.9% drop in girls' basketball and 8.1% drop in girls' volleyball. West Virginia switched, and saw a stunning 19.4% drop in girls' basketball and a 27.4% drop in *boys'* basketball. Michigan continues to fight because it truly believes it is acting in the best interests of all its student-athletes and schools, and the participation numbers demonstrate that it is succeeding admirably.

The *Sea Clammers* issue also merits review. Congress plainly did not intend for the details of implementing gender equality in high school athletics to be worked out by the courts through abstract constitutional litigation under § 1983. It instead delegated authority for the promulgation of comprehensive regulations under Title IX, and the Department of Education's implementing guidance does not even mention the time of year when sports are played as an indicium of inequality.[11]

CONCLUSION

The petition for certiorari should be granted.

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[10] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Final Rule, 71 Fed. Reg. 62,530 (Oct. 25, 2006) (codified at 34 C.F.R. pt. 106) (adopting regulations "to provide recipients with additional flexibility in providing single-sex classes, extracurricular activities, and schools in elementary and secondary education").

[11] *See* Title IX of the Education Amendments of 1972, A Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71, 416 (Dec. 11, 1979).

Respectfully submitted,

EDMUND J. SIKORSKI, JR.
EDMUND J. SIKORSKI, JR., P.C.
3300 WASHTENAW AVENUE
SUITE 240
ANN ARBOR, MI 48104
(734) 677-2110

WILLIAM M. AZKOUL
WILLIAM M. AZKOUL, P.C.
161 OTTAWA AVENUE N.W.
SUITE 205-C, WATERS BLDG.
GRAND RAPIDS, MI 49503
(616) 458-1315

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
ALEXANDER MALTAS
LATHAM & WATKINS LLP
555 11TH STREET N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

No. 02-1127

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COMMUNITIES FOR EQUITY, on behalf of itself, its members and all those similarly situated; Diane Madsen, on behalf of her minor daughters and all those similarly situated; and Jay Roberts-Eveland, on behalf of her minor daughter and all those similarly situated,
Plaintiffs-Appellees,

v.

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC., on behalf of itself and its members,
Defendant-Appellant.

Argued: March 14, 2006.

Decided and Filed: August 16, 2006.

Rehearing and Rehearing En Banc Denied: December 7, 2006.

Before: KENNEDY, COLE and GILMAN, Circuit Judges.

OPINION

GILMAN, Circuit Judge.

Communities for Equity (CFE), a group comprised of parents and high school athletes that advocates on behalf of Title IX compliance and gender equity in athletics, brought a class action lawsuit against the Michigan High School Athletic Association (MHSAA), arguing that MHSAA's scheduling of sports seasons discriminates against female athletes on the basis of gender. The district court concluded

that MHSAA's actions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title IX of the Civil Rights Act of 1964, and Michigan's Elliott-Larsen Civil Rights Act. In 2004, this court affirmed the judgment of the district court on the ground that MHSAA's actions violate the Equal Protection Clause. *Cmtys. for Equity v. Mich. High School Athletic Ass'n (CFE I)*, 377 F.3d 504 (6th Cir. 2004). The *CFE I* court did not reach the Title IX or state-law issues.

Following a petition for certiorari filed by MHSAA, the United States Supreme Court vacated the *CFE I* decision and remanded the case for further consideration. The order, commonly referred to as a grant/vacate/remand order (GVR), directed this court to reconsider the case in light of *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (2005), a case decided in the Court's last term. After reconsideration, and for the reasons set forth below, we again **AFFIRM** the judgment of the district court.

I. BACKGROUND

The background of this case is thoroughly discussed in the findings of fact of the district court, *Communities for Equity v. Michigan High School Athletic Association*, 178 F. Supp. 2d 805, 807-846 (W.D. Mich. 2001), and in *CFE I*, 377 F.3d at 506-10. CFE's basic complaint is that MHSAA discriminates against female high-school athletes by scheduling girls' sports to play in disadvantageous, nontraditional seasons. Our task is now to reevaluate this claim in light of the Supreme Court's GVR, which provides in relevant part as follows: "Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of our opinion in *Rancho Palos Verdes v. Abrams*." *Mich. High School Athletic Ass'n v. Cmtys. for Equity*, 544 U.S. 1012, 125 S. Ct. 1973, 161 L. Ed. 2d 845 (2005).

On remand, MHSAA argues that, based on the Supreme Court's decision in *Ranchos Palos Verdes*, Title IX provides the exclusive remedy for the alleged violations that bars CFE from seeking additional remedies under 42 U.S.C. § 1983. CFE responds by contending that *Rancho Palos Verdes* does not apply to the present case and that CFE is therefore entitled to prevail under both Title IX *and* § 1983.

II. ANALYSIS

A. Standard of review

Constitutional and statutory interpretation questions are issues of law, which we review de novo. *Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir. 2004). In contrast, we apply the "clearly erroneous" standard of review to the factual findings of the district court. *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 519 (6th Cir. 2003).

B. The Effect of *Rancho Palos Verdes*

1. Implications of the GVR

MHSAA relies on the following description of the GVR procedure to argue that the result in *CFE I* must be altered:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate.

Lawrence v. Chater, 516 U.S. 163, 167, 116 S. Ct. 604, 133 L. Ed. 2d 545 (1996) (holding that a GVR is "an appropriate exercise of [the Supreme Court's] discretionary certiorari jurisdiction"). Subsequent interpretations of that language,

however, make clear that a GVR does not indicate, nor even suggest, that the lower court's decision was erroneous.

In *Stutson v. United States*, 516 U.S. 193, 197-98, 116 S. Ct. 600, 133 L. Ed. 2d 571 (1996), for example, the Court issued a GVR directing the Eleventh Circuit to reconsider that case in light of the Supreme Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993). Focusing on the fact that the Eleventh Circuit did not fully consider whether *Pioneer* applied, and classifying *Pioneer* as a "*potentially* relevant decision*[]*, "516 U.S. at 197 (emphasis added), the *Stutson* Court acknowledged that the Eleventh Circuit may "conclude that *Pioneer* does not apply" and thus reach the same result on remand. *Id.* at 196, 116 S. Ct. 600.

Other courts have also opined that a GVR does not necessarily indicate that the Supreme Court desires a different result. In *Gonzalez v. Justices of the Municipal Court of Boston*, 420 F.3d 5, 7 (1st Cir. 2005), for example, the First Circuit pondered the implication of a GVR that instructed the court to reconsider an earlier holding in light of a recent Supreme Court decision. After discussing the above-quoted language from *Lawrence*, the *Gonzales* court opined:

> It is important to remember, however, that a GVR order is neither an outright reversal nor an invitation to reverse; it is merely a device that allows a lower court that had rendered its decision without the benefit of an intervening clarification to have an opportunity to reconsider that decision and, if warranted, to revise or correct it. . . . Consequently, we do not treat the Court's GVR order as a thinly-veiled direction to alter our course; rather, the order recognizes—as do we—that the *Smith* decision is pertinent and requires us

> to determine whether anything that the *Smith* Court said demands a different result.

Id. at 7-8; *see also United States v. Norman*, 427 F.3d 537, 538 n.1 (8th Cir. 2005) ("The GVR is not the equivalent of a reversal on the merits, however. Rather, the Court remands for the sake of judicial economy—so that the lower court can more fully consider the issue with the wisdom of the intervening development."). The GVR therefore requires us to consider the effect of *Rancho Palos Verdes* on the present case, but it does not suggest that the Supreme Court believes that *CFE I* was wrongly decided.

2. Summary of the Sea Clammers/Rancho Palos Verdes doctrine

In order to analyze the issue highlighted by the GVR, a brief summary of § 1983 and the line of cases on which *Rancho Palos Verdes* relied is essential. The key language of 42 U.S.C. § 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

For plaintiffs, then, § 1983 serves as a vehicle to obtain damages for violations of both the Constitution and of federal statutes.

Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981), is the seminal case discussing the intersection between statutory remedies and § 1983 , and it provides the basis for the Supreme Court's later decision in *Rancho*

Palos Verdes. In *Sea Clammers*, the plaintiffs were fishermen who worked off the coast of New York and New Jersey. They brought suit under the Federal Water Pollution Control Act (the FWPCA), 33 U.S.C. § 1251, the Marine Protection, Research, and Sanctuaries Act of 1972 (the MPRSA), 33 U.S.C. § 1401, and § 1983, alleging a violation of the preceding statutes as a result of damage to fishing grounds caused by polluters dumping sewage and other waste in the ocean. *Sea Clammers*, 453 U.S. at 4-5, 101 S. Ct. 2615.

The substantive statutes at issue in *Sea Clammers*—the FWPCA and the MPRSA—authorize the Administrator of the Environmental Protection Agency (EPA) to seek civil and criminal penalties for violations of the acts, and permitted "any interested person[]" to seek judicial review of the Administrator's actions regarding the issuance of pollutant discharge permits and the establishment of pollution standards. *Id.* at 13-14, 101 S. Ct. 2615. Both statutes contain an express citizen-suit provision, but those provisions authorize private parties to sue only for injunctive relief rather than the monetary relief the plaintiffs in *Sea Clammers* were seeking. *Id.*

The *Sea Clammers* Court focused on Congress's intent, and held that the plaintiffs could not use § 1983 as a vehicle to enforce federal statutory laws where the acts themselves contained "unusually elaborate enforcement provisions." *Id.* at 13, 101 S. Ct. 2615. Because Congress enacted "so many specific statutory remedies, including the two citizen-suit provisions" in the FWPCA and the MPRSA, the Court found it "hard to believe that Congress intended to preserve the § 1983 right of action." *Id.* at 20, 101 S. Ct. 2615. Instead, the *Sea Clammers* Court emphasized that the nature and extent of the remedies available in the water-pollution statutes clearly indicated that Congress had considered the methods of redress for violations of the statutes and intended the remedies provided in the statutes to be complete. *Id.* As a result, the Court held that when claiming

a violation of the FWPCA and the MPRSA, the remedies authorized in those acts preclude resort to § 1983.

The Court interpreted the *Sea Clammers* doctrine a few years later in *Smith v. Robinson,* 468 U.S. 992, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984). In *Smith,* the plaintiffs were the parents of a handicapped child who was allegedly being denied a "free appropriate public education." They brought suit against the school district for relief under the Education of the Handicapped Act (the EHA), 20 U.S.C. § 1400, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, pursuant to § 1983. Unlike *Sea Clammers,* which concerned an effort to enlarge a statutory remedy by asserting a claim based on the "and laws" provision of § 1983 , the *Smith* case questioned the ability of plaintiffs to use § 1983 as a vehicle to enforce a constitutional remedy *in addition to* the remedies available under the EHA. *Id.* at 1005, 104 S. Ct. 3457. Because the Court concluded that the constitutional claims were "virtually identical to their EHA claims," it framed the issue as whether "Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert those claims." *Id.* at 1009, 104 S. Ct. 3457.

The Court then engaged in a thorough analysis of the EHA's provisions and legislative history in order to answer this question. *Id.* at 1009-12, 104 S. Ct. 3457. After discussing the "carefully tailored administrative and judicial mechanism set out in the [EHA]," the Court concluded:

> In light of the comprehensive nature of the procedures and guarantees set out in the EHA and Congress' express efforts to place on local and state education agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection

> claim to a free appropriate public education. . . . [W]e think Congress' intent is clear. Allowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme.

Id. at 1011-12, 104 S. Ct. 3457. In other words, Congress intended for the EHA to serve as the exclusive method by which plaintiffs could assert the right to a free appropriate public education, and resort to § 1983 is prohibited. *Id.* at 1013, 104 S. Ct. 3457. Such an intent, according to the Court, was found in the comprehensive procedures and guarantees established in the EHA. *Id.*

Finally, the Court decided *Rancho Palos Verdes* in 2005 and remanded the present case in light of that decision. In *Rancho Palos Verdes*, plaintiff Abrams brought suit against the Rancho Palos Verdes municipal government after he was denied a permit to build a radio tower on his property. 125 S. Ct. at 1457. Abrams sought injunctive relief under the Telecommunications Act (the TCA), 47 U.S.C. § 332(c)(7), and damages and attorney's fees under § 1983—essentially using both statutes to enforce the violation of rights created by the TCA. *Id.* Like the statutes at issue in *Sea Clammers* and *Smith*, the TCA itself does not expressly provide for monetary relief. *Id.* at 1459. Instead, the TCA permits private parties to seek redress through administrative channels and through injunctive relief in the courts. *Id.*; *see also* 47 U.S.C. § 332(c)(7). The Court, as it had done in *Sea Clammers*, 435 U.S. at 20, 101 S. Ct. 2615, framed the issue as whether Congress intended the judicial remedy expressly authorized in the TCA to coexist with the alternative remedy authorized in § 1983. *Rancho Palos Verdes*, 125 S. Ct. at 1458.

Although the TCA expressly provides a private judicial remedy, the Court explicitly rejected the notion that the availability of a private remedy under the substantive statute necessarily forecloses an action under § 1983. *Id.* at 1459; *see also ASW v. Oregon*, 424 F.3d 970, 977-78 (9th Cir.

2005) (characterizing the holding of *Rancho Palos Verdes* as one focused on the comprehensiveness of the remedy). The Court instead looked to the extent of the remedy authorized by the TCA, reasoning that "the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not." *Rancho Palos Verdes*, 125 S. Ct. at 1458-59 (noting that both *Sea Clammers* and *Smith* "rested upon the existence of more restrictive remedies provided in the violated statute itself"). After engaging in a careful analysis of the legislative history of the TCA and the remedies it expressly provided, *id.* at 1459-62, the Court concluded that Congress must have intended the TCA remedies to be the exclusive relief available to a plaintiff complaining of a TCA violation. *Id.* at 1462.

Sea Clammers and the other cases on which the Supreme Court relied operate under the assumption that limitations placed by Congress upon statutory remedies are not to be evaded through § 1983. *See ASW*, 424 F.3d at 978 (noting that the *Rancho Palos Verdes* Court wanted to prevent § 1983 from serving as an "end run around the enforcement mechanism Congress provided"). The TCA, like the statutes at issue in *Sea Clammers* and *Smith*, contains express private remedies for violations of rights granted in those statutes. *See Rancho Palos Verdes*, 125 S. Ct. at 1458-59, 1462. Because the administrative and judicial remedies authorized in the TCA are detailed, yet more restrictive than the remedies available under § 1983, the Court reasoned that it would contravene Congress's intent to allow Abrams to recover under both statutes where Congress had provided in the TCA precisely the remedies it considered appropriate. *Id.* at 1462.

3. Application of the Sea Clammers/Rancho Palos Verdes doctrine to Title IX

As a result of the decision in *Rancho Palos Verdes* and the GVR, MHSAA argues that Title IX precludes CFE's claims under § 1983. CFE, however, contends that the *Sea Clammers* line of cases does not control the result here, and urges us to reach the merits of both the Title IX claim *and* the constitutional claims brought pursuant to § 1983. For the reasons set forth below, we agree with CFE that Title IX does not preclude recovery under § 1983.

Both *Sea Clammers* and *Rancho Palos Verdes* dealt with plaintiffs who attempted to enforce federal statutory rights through the "and laws" language of § 1983. The *Sea Clammers* plaintiffs based their action on several federal statutes, but sought recovery pursuant to § 1983 because of the additional remedies available through that statute that were not available under the substantive water-pollution statutes. Similarly, the plaintiff in *Rancho Palos Verdes* sought money damages and attorney's fees pursuant to § 1983 because the TCA failed to authorize that type of recovery. In both *Sea Clammers* and in *Rancho Palos Verdes*, furthermore, the rights that plaintiffs were asserting were based solely on federal statutory law—in other words, rights created by Congress. Even though the statutes that created the very rights that they were asserting did not authorize monetary damages, the plaintiffs in *Sea Clammers* and *Rancho Palos Verdes* sought such damages pursuant to § 1983.

This litigation strategy was explicitly disapproved of by the Supreme Court in both cases and forms the bedrock for the *Sea Clammers* principle. The key inquiry is whether Congress intended the remedies in the substantive statute to be exclusive. *See Sea Clammers*, 453 U.S. at 14, 101 S. Ct. 2615 ("In view of these elaborate enforcement provisions, it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under [the water-pollution statutes].)" To allow the plaintiffs in such cases to benefit from the additional remedies available pursuant to § 1983 would create an end-

run around the substantive statutory remedies and contravene Congress's intent. *See, e.g., Smith,* 468 U.S. at 1012, 104 S. Ct. 3457 (relying on the *Sea Clammers* doctrine to hold that "[a]llowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme"). The Court recently reaffirmed its concern in *Rancho Palos Verdes* when it held that "enforcement [of the TCA] through § 1983 would distort the scheme of . . . limited remedies created by [the TCA]." 125 S. Ct. at 1462.

Unlike the plaintiffs in *Sea Clammers* and *Rancho Palos Verdes*, CFE invoked § 1983 not as a vehicle to enforce the substantive federal law found in Title IX, but as a vehicle to recover for alleged violations of the Equal Protection Clause of the Fourteenth Amendment. This is a critical distinction. The Court's analysis both in *Sea Clammers* and *Rancho Palos Verdes* hinges on the fact that when Congress created the particular rights through statute, it also created particular remedies for those statutory violations. See *Rancho Palos Verdes*, 125 S. Ct. at 1458 ("Thus, the existence of a more restrictive private remedy has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not."); *see also Sea Clammers*, 453 U.S. at 20, 101 S. Ct. 2615 ("When the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.").

In the present case, however, CFE asserts violations of Title IX *and* of the Fourteenth Amendment, meaning that CFE's allegations would be actionable even if Congress had never enacted Title IX. The question of what Congress intended, then, concerns not only which remedies Congress sought to provide for Title IX violations, but whether Congress intended to abandon the rights and remedies set forth in Fourteenth Amendment equal protection jurisprudence when it enacted Title IX in 1972.

Because *Sea Clammers* and *Rancho Palos Verdes* concerned plaintiffs who attempted to recover only for violations of federal statutory law (as opposed to constitutional law) through the enforcement mechanism of § 1983, those cases are distinguishable from the present case. Although not on all fours, the *Smith* case provides the closest fit to the situation here because the § 1983 claims in *Smith* were based on Fourteenth Amendment violations rather than the violations of "other laws." 468 U.S. at 1005, 104 S. Ct. 3457. The *Smith* Court held that where the constitutional claims pursuant to § 1983 were "virtually identical" to the statutory claims, the § 1983 claims were precluded because "Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute." *Id.* at 1009, 104 S. Ct. 3457.

Applying *Smith* to the case before us, the necessary factors to consider in order to determine if Title IX precludes resort to § 1983 are (1) whether CFE's Title IX claims are "virtually identical" to its constitutional claims, and (2) whether the remedies provided in Title IX indicate that Congress intended to preclude reliance on § 1983. *Id.* Recovery under § 1983 is precluded by *Smith* only if both factors are satisfied. *See Smith*, 468 U.S. at 1009, 104 S. Ct. 3457.

A comprehensive discussion of both factors is not necessary so long as one factor is clearly not satisfied, which is the case here. *See Lillard v. Shelby County Board of Education*, 76 F.3d 716, 723 (6th Cir. 1996) (declining to engage in a protracted discussion of the first factor because the second one was not satisfied). So even if we were to hold that CFE's Title IX claims are "virtually identical" to its claims brought pursuant to § 1983, we would still have to consider whether Congress intended for Title IX to supplant CFE's constitutional claim pursuant to § 1983. *See Smith*, 468 U.S. at 1009, 104 S. Ct. 3457 (determining that

the claims were virtually identical and then considering "whether Congress intended that the EHA be the exclusive avenue through which a plaintiff may assert those claims.").

Our dissenting colleague correctly notes that the *Smith* inquiry contains two prongs: (1) whether the constitutional claim pursuant to § 1983 is virtually identical to the claim under Title IX, and (2) whether Title IX provides a remedy comprehensive enough to be exclusive. After articulating the inquiry, however, the dissent appears to conflate the two prongs by stating that once a court determines that the constitutional claim pursuant to § 1983 is virtually identical to the statutory claim, we have reason to "assume that Congress intended to preclude use of § 1983 to enforce those claims." Dissenting Op. at 23. This purported presumption finds no support in the caselaw, and we respectfully disagree that such a presumption exists. We instead believe that the two prongs set forth in *Smith* are intended to be independently evaluated. Neither the Supreme Court nor any of our sister circuits has suggested that the second prong is a more difficult obstacle for a plaintiff to overcome once the first prong is satisfied.

This court in *Lillard* has already addressed the second prong of the *Smith* inquiry—whether Title IX provides a remedy comprehensive enough to be exclusive. *Id.* Several plaintiffs in *Lillard* sought relief under both Title IX and under the First and Fourteenth Amendments (as remedied through § 1983). The *Lillard* court was faced with the issue of "whether Title IX's statutory remedy precludes the plaintiffs from bringing a substantive due process claim under section 1983," *id.* at 718, and it began its analysis by distinguishing *Sea Clammers*:

> [W]hile in *National Sea Clammers*, allowing the section 1983 action to enforce the rights at issue would have effectively circumvented the implicit congressional intention to foreclose the private rights of action, here, the plaintiffs' section 1983 action does not attempt either to circumvent Title

> IX procedures, or to gain remedies not available under Title IX. . . . Plainly, *National Sea Clammers* does not, on its face, stand for the proposition that a federal statutory scheme can preempt independently existing constitutional rights, which have contours distinct from the statutory claim, thus prohibiting a section 1983 action grounded in substantive due process. Instead, that case speaks only to whether federal statutory rights can be enforced both through the statute itself *and* through section 1983.

Id. at 723.

After distinguishing *Sea Clammers*, the *Lillard* court went on to characterize *Smith* as standing for the proposition that Congress can create a statutory vehicle as an alternative to enforcing constitutional rights pursuant to § 1983. *Id.* As highlighted by the second factor of the *Smith* inquiry, however, Congress's intent to do so must be clear. *Id.*

The *Lillard* court concluded that, in contrast to the statutes at issue in *Sea Clammers* and *Smith*, Title IX contains no comprehensive enforcement scheme indicating that Congress intended to preclude recovery under § 1983. *Id.* Although the Supreme Court found an implied private right of action for Title IX violations in *Cannon v. University of Chicago*, 441 U.S. 677, 683, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979), the only enforcement mechanism expressly authorized in Title IX is the withdrawal of federal funds. *Lillard*, 76 F.3d at 723. This stands in stark contrast to the water-pollution statutes at issue in *Sea Clammers* and the EHA at issue in *Smith*. Those statutes expressly provided "carefully tailored" administrative and judicial remedies clearly indicating that Congress intended plaintiffs seeking redress to use the substantive statute rather than the additional remedies available under § 1983. *Sea Clammers*, 453 U.S. at 20, 101 S. Ct. 2615; *Smith*, 468 U.S. at

1009, 104 S. Ct. 3457. A review of the provisions and legislative history of Title IX, however, led this court to the following conclusion:

> One can only conclude, therefore, that *National Sea Clammers* does not speak to Title IX, since there is no evidence in Title IX that 'Congress intended to foreclose [a § 1983] action by providing an exclusive remedy within' Title IX. Thus, even if the defendants' argument had been directed at an attempt by the plaintiffs to enforce their Title IX rights, rather than their constitutional rights, through section 1983, *National Sea Clammers* would have provided no support.

Lillard, 76 F.3d at 723 (citation omitted).

Whereas the Supreme Court in *Sea Clammers* and *Smith* was able to highlight specific statutory remedies as evidence of Congress's intent for the substantive statutes to provide the exclusive means of relief, the *Lillard* court found no similar examples of congressional intent in Title IX. Title IX, after all, contains *no* express private remedy at all. *Id.; see also Rancho Palos Verdes*, 125 S. Ct. at 1459 (citing *Sea Clammers* and *Smith*, and explaining that the existence of a private judicial remedy is an important factor to consider when attempting to discern congressional intent). *Lillard*, then, concluded that the remedies afforded in Title IX are insufficient to preclude the pursuit of a remedy under § 1983.

4. The precedential value and vitality of Lillard

Our dissenting colleague argues that we are not bound by *Lillard* because its discussion regarding the extent of the Title IX remedy was dicta. *See* Dissenting Op. at 23. We respectfully disagree. Rather than focusing on the first *Smith* factor--whether the constitutional and statutory claims are virtually identical—the *Lillard* court held that *"neither [Smith] factor appears here."* 76 F.3d 716, 723 (6th Cir. 1996) (emphasis added). We therefore do not see the

holding as one focused on the first *Smith* factor, nor the discussion of the second *Smith* factor as dicta. In fact, the *Lillard* court engaged in no substantive analysis of the first *Smith* factor at all, instead dedicating the entirety of the *Smith* analysis to a discussion of the second factor-whether Title IX provides a remedy comprehensive enough to be exclusive.

The dissent's emphasis on one line of *Lillard* to the effect that *Sea Clammers* would not have required preemption "even if the defendants' argument had been directed at an attempt by the plaintiffs to enforce their Title IX rights," Dissenting Op. at 23, does not persuade us that *Lillard*'s conclusion as to the extent of the Title IX remedy was dicta. In *Lillard*, the court articulated two "important distinctions" that rendered the *Sea Clammers* analysis inapposite: (1) the plaintiffs in *Lillard* were seeking to enforce constitutional rights rather than statutory rights, and (2) Title IX, unlike the statutes at issue in *Sea Clammers*, did not provide a comprehensive and exclusive remedy. 76 F.3d at 722-23. The "even if" language on which our colleague seizes, then, proves nothing more than that the court had two grounds for concluding that the plaintiffs could seek remedies under both Title IX and § 1983, and that the outcome would have remained the same despite the nature of the underlying claim.

We also acknowledge our dissenting colleague's argument that *Lillard* should not control our decision in the present case because *Lillard* dealt with a substantive due process claim pursuant to § 1983 rather than an equal protection claim. *See* Dissenting Op. at 21-25. Contrary to our dissenting colleague's view, however, we see no consequence to this distinction. As discussed above, regardless of whether CFE's equal protection claim is "virtually identical" to its Title IX claim, we still must consider whether Title IX provides the exclusive and comprehensive remedy for MHSAA's alleged violations. *Lillard* answered this latter inquiry in the negative, and we

remain bound by its holding despite the dissent's suggestion that "[w]hen ascertaining Congress' intent, . . . we have to do so with the precise rights in mind." Dissenting Op. at 22.

Although the *Lillard* court noted that the plaintiffs were seeking to enforce substantive due process rights that were "wholly independent" and "totally distinct" from the rights granted in Title IX, its discussion of the extent of the remedies contained in Title IX focused on the provisions of Title IX generally, not on whether Title IX's enforcement scheme was comprehensive with regard to the substantive due process claim. We have found no decision, either by the Supreme Court or our sister circuits, holding that Congress intended Title IX to be the exclusive remedy for one claim but not another, and we fail to understand how this could possibly be the case considering that Congress provided no express remedies at all in the statute.

The dissent also relies on *Smith*, 468 U.S. at 1013-1014, 104 S. Ct. 3457, as support for the proposition that "for each constitutional claim, a court must engage in a separate analysis of whether that claim, provided for by a statutory remedy, is precluded from being brought under § 1983. . . ." Dissenting Op. at 22. Although we acknowledge that the *Smith* Court did in fact contemplate two separate analyses—one concerning the equal protection claim and one concerning the substantive due process claim—the statute at issue in *Smith* provided *express* remedies that the Court concluded were carefully tailored so as to preempt recovery for an equal protection violation under § 1983. The *Smith* Court's apparent willingness (we say willingness because the Court did not ultimately reach this issue) to conduct a similar analysis as it pertained to substantive due process is not surprising given the clear textual indication of Congress's intent in the EHA to preempt reliance on § 1983 by affording a comprehensive remedy for equal protection claims, whereas the statutory language may not provide an adequate remedy for other constitutional claims brought pursuant to § 1983.

Lillard's analysis, however, was based on the fact that "Title IX contains no comprehensive enforcement scheme." 76 F.3d at 723. The Lillard court did not suggest that the dearth of enforcement provisions in Title IX was relevant to substantive due process claims only, as opposed to equal protection claims or other claims brought pursuant to § 1983. In fact, language in the opinion indicates that the court considered the lack of remedies in Title IX as it pertained to *all* § 1983 claims. *Id.* ("[T]here is no evidence in Title IX that Congress intended to foreclose a section 1983 action by providing an exclusive remedy within Title IX.") (citation and quotation marks omitted).

Two of our sister circuits, moreover, have relied on *Lillard* to hold that Title IX is not comprehensive enough to be exclusive even though the plaintiffs in those cases sought relief under § 1983 for equal protection violations rather than substantive due process violations. *See Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997) (distinguishing *Sea Clammers* and finding "unpersuasive the [] argument that Title IX contains a sufficiently comprehensive remedial scheme") (quotation marks omitted); *Seamons v. Snow*, 84 F.3d 1226, 1234 (10th Cir. 1996) ("We agree with the Sixth Circuit [in *Lillard*], and conclude that [the plaintiff's] § 1983 action [to enforce independent constitutional rights] is not barred by Title IX."). The analysis employed by the Eighth and Tenth Circuits in those cases did not differ from the analysis of *Lillard* even though those courts were, like in the present case, considering the preemption of equal protection claims pursuant to § 1983. In sum, the question of whether Title IX is comprehensive enough to be exclusive is an inquiry that does not change regardless of the constitutional claim at issue.

The bottom-line argument of both our dissenting colleague and MHSAA is that we should not follow *Lillard*. MHSAA contends that the GVR commands us to reconsider, and thus overturn, that decision. The dissent likewise articulates its disagreement with the reasoning of

Lillard, arguing that the second prong of the *Smith* inquiry must include consideration of not only the express remedies in Title IX, but also the remedies implied by the Supreme Court. We will address these arguments in turn.

MHSAA argues that "the clear implication of the Supreme Court's remand order is that it would like this Court to reconsider *Lillard*." The Supreme Court, of course, did not mention *Lillard* in the GVR. Nor did the Court address Title IX in either the GVR or in *Rancho Palos Verdes*, the case on which the GVR is based. Although MHSAA argues that *Rancho Palos Verdes* demands that we revisit *Lillard*, it fails to support its contention with any reasoned analysis. Instead, MHSAA simply recites the holding of *Sea Clammers*, acknowledges this court's holding in *Lillard*, and concludes that because *Rancho Palos Verdes* falls within the *Sea Clammers* line of cases, *Lillard* must be revisited.

MHSAA's own characterization of the *Sea Clammers* holding—"that specific statutory remedies displace the general private right of action under 42 U.S.C. § 1983 *when they are comprehensive enough to be exclusive*"—demonstrates why *Lillard* is still good law. The *Lillard* court acknowledged the *Sea Clammers* doctrine and held that it did not apply to Title IX because Title IX was not comprehensive enough to be exclusive. In other words, the *Lillard* court found that the dearth of remedies authorized in Title IX, either private or public, indicated that Congress did not intend to preclude recovery under § 1983 when it enacted Title IX. *See Lillard*, 76 F.3d at 723.

Rancho Palos Verdes did not alter the premise on which *Sea Clammers* was based and thus did not alter the vitality of *Lillard*. In *Rancho Palos Verdes*, as in the *Sea Clammers* and *Smith* cases, the primary question was whether Congress intended to foreclose reliance on § 1983. The Court in each of these cases focused on the extent of the rights and remedies provided in the statutory scheme. In those cases, the statutes at issue provided detailed means by

which the private parties could seek redress, either through judicial or administrative channels. And in each of those cases, Congress neglected to explicitly authorize the types of remedies available under § 1983. The lodestar, in all cases, is what Congress intended. This court in *Lillard* addressed that precise inquiry as it related to Title IX and held that Congress did not intend to preclude recovery under § 1983. 76 F.3d at 723. "[U]nless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision," *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985), we remain bound by *Lillard*.

We see nothing in *Rancho Palos Verdes* that requires modification of *Lillard* or its reasoning, even though, as MHSAA notes, three other circuits have held that Congress intended Title IX to be exclusive. *See Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 756-59 (2d Cir. 1998); *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862-63 (7th Cir. 1996); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990). Unlike this court in *Lillard*, the Second, Third, and Seventh Circuits declined to distinguish *Sea Clammers* on the basis that the Title IX cases concerned application of § 1983 to enforce independent constitutional rights rather than federal statutory law. *See, e.g., Bruneau*, 163 F.3d at 757 ("We see nothing in *Sea Clammers* that would support a constitutional rights exception."). Those circuits also held that because the Supreme Court concluded that Title IX contains an implied damages remedy, *see Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 76, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992), Title IX "gives plaintiffs access to the full panoply of judicial remedies." *See Waid*, 91 F.3d at 862-63 (holding that such access indicates Congress's intent to preclude reliance on § 1983).

On the other hand, MHSAA fails to recognize the cases from the Eighth and Tenth Circuits that have agreed with

this court's holding in *Lillard*. *See Crawford*, 109 F.3d at 1284; *Seamons*, 84 F.3d at 1234. The fact that the courts of appeal are evenly split on the issue of whether Congress intended Title IX to provide a complete remedy bolsters the conclusion that the GVR in the present case did not imply that this court should reconsider *Lillard*. Even if the Supreme Court thought *Lillard* was wrongly decided and attempted to cure the defect through a GVR in the present case, the decisions of the Eighth and Tenth Circuits would be unaffected—meaning that the circuit split would continue.

Because we have determined that *Lillard* is controlling precedent, we need not extol its virtues in order to reach a decision in the present case. We nevertheless defend *Lillard*'s approach in response to the great weight that our dissenting colleague gives to *Cannon v. University of Chicago*, 441 U.S. 677, 689, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979), in which the Supreme Court held that a private remedy was implicit in Title IX. Dissenting Op. at 24. The dissent also relies on *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 72, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992), in which the Supreme Court relied on Congress's silence subsequent to the *Cannon* decision to hold that Congress "did not intend to limit the remedies available in a suit brought under Title IX." *Id.*; *Franklin*, 530 U.S. at 73, 120 S. Ct. 2054. Although *Cannon* and *Franklin* relied on implicit evidence of congressional intent rather than the explicit text of Title IX, the dissent reasons that "[t]he [implied] intent found by the Supreme Court. . . should be given the same weight as expressed intent[]"—essentially arguing that the private damages remedy that the Supreme Court read into Title IX satisfies *Smith*. Dissenting Op. at 24. We respectfully disagree.

Although the Supreme Court read an implied remedy into Title IX in *Cannon*, 441 U.S. at 689, 99 S. Ct. 1946, this implied remedy does not satisfy the second prong of the *Smith* inquiry. The Supreme Court has made clear that the

question of what Congress intended is an inquiry focused on the statute itself. In *Smith*, for example, the Court referred to the "carefully tailored administrative and judicial mechanism *set out in the statute*." 468 U.S. at 1009, 104 S. Ct. 3457 (emphasis added). The *Rancho Palos Verdes* Court also focused on the explicit text of the statute:

> Our cases have explained that evidence of such congressional intent may be found *directly in the statute creating the right*, or inferred from the *statute's creation* of a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983. . . . The provision of an *express*, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983."

544 U.S. at 120-21, 125 S. Ct. 1453 (emphasis added). Although the Court later in its decision discusses the "availability of a private judicial remedy"—language that the dissenting opinion adopts—without making the distinction between explicit and implied remedies, the statute at issue in *Rancho Palos Verdes* (as well as in *Sea Clammers* and *Smith* contains an explicit private remedy. We therefore read *Rancho Palos Verdes* as extending only to statutes that contain an explicit private remedy that is sufficiently comprehensive for us to infer that Congress intended the remedy to be exclusive.

Title IX does not satisfy this standard. The fact that the Supreme Court implied a private remedy in *Cannon* gives strength to the argument that Congress did not intend for the termination of federal funds—the only remedy explicitly authorized by Title IX—to serve as a comprehensive or exclusive remedy. *See* Michael A. Zwiebelman, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. Chi. L. Rev. 1465, 1481-82 (1998). Rather, the Supreme Court held that an implied private right of action—in addition to the explicit

remedy of termination of federal funds—was necessary to achieve the fundamental purpose of Title IX. *Cannon*, 441 U.S. at 709, 99 S. Ct. 1946. Whether Congress intended to create or foreclose a private remedy, as was at issue in *Cannon*, is decidedly different from the second prong of *Smith*, which asks whether Congress intended to create an enforcement scheme so comprehensive that it could serve as the *exclusive* avenue for relief, thus precluding claims under § 1983.

The Supreme Court's decision in *Franklin*, 503 U.S. at 66, 112 S. Ct. 1028, does not undermine our analysis. *Franklin's* conclusion was guided by the traditional presumption that all appropriate remedies may be implied in a statute unless Congress has explicitly indicated otherwise. *See id.* In other words, the Court relied on Congress's *silence* in implying the damages remedy in *Franklin*. *Id.* Congressional silence, though sufficient to find an implied remedy, cannot be equated with the carefully tailored remedies present in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*.

Justice Stevens's concurrence in *Rancho Palos Verdes* supports our determination that the *Smith* inquiry is distinct from the question of whether the Supreme Court may imply a private judicial remedy:

> Sometimes the question is whether, despite its silence, Congress intended us to recognize an implied cause of action. [citing *Cannon*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560]. Sometimes we ask whether, despite its silence, Congress intended us to enforce the pre-existing remedy provided in [42 U.S.C. § 1983]. *And still other times*, despite Congress' inclusion of specific clauses designed specifically to preserve pre-existing remedies, we have nevertheless concluded that Congress impliedly foreclosed the § 1983 remedy. [citing *Sea Clammers*, 453 U.S. at 13, 101 S. Ct. 2615].

Rancho Palos Verdes, 544 U.S. at 129 (Stevens, J., concurring in the judgment) (emphasis added). The *Smith* inquiry, as highlighted by Justice Stevens, is not an offshoot of the inquiry performed in *Cannon*. *See also Gonzaga Univ. v. Doe*, 536 U.S. 273, 283, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002) ("[W]hether a statutory violation may be enforced through § 1983 is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute.").

In short, we cannot agree with our dissenting colleague that Title IX precludes relief under § 1983 simply because the Supreme Court has implied a private right of action. The Supreme Court has never held that an implied judicial remedy is enough to preclude relief under § 1983, and the caselaw does not support such a conclusion in the present case. The rationale on which *Lillard* was based, therefore, remains persuasive. Because we conclude that *Lillard* remains good law and is unaffected by *Rancho Palos Verdes*, CFE may seek remedies under § 1983 as well as under Title IX.

C. Equal Protection Clause

1. State action

The Fourteenth Amendment to the United States Constitution provides that"[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." An entity or individual charged under § 1983 with a Fourteenth Amendment violation must be a "state actor." *LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1111 (6th Cir. 1995) ("To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class.") (citation and quotation marks omitted).

As a threshold issue, therefore, we must determine whether MHSAA is a state actor.

In determining that MHSAA was a state actor, the district court relied upon the United States Supreme Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001). *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 846-848 (W.D. Mich. 2001). The *Brentwood* Court addressed the issue of whether the Tennessee Secondary School Athletic Association (TSSAA), which was "incorporated to regulate interscholastic athletic competition among public and private secondary schools," engaged in state action when it enforced one of its rules against a member school. *Brentwood Academy*, 531 U.S. at 290. Because of "the pervasive entwinement of state school officials in the structure of the association," the Court held that the TSSAA's regulatory activity constituted state action. *Id.* at 291, 121 S. Ct. 924. The Court acknowledged that the analysis of whether state action existed was a "necessarily fact-bound inquiry," and noted that state action may be found only where there is "such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Id.* at 295, 298, 121 S. Ct. 924 (citation and quotation marks omitted).

Public schools constituted 84% of TSSAA's membership, the Court noted, and public school faculty and administrators provided TSSAA's leadership. *Id.* at 298, 121 S. Ct. 924. The Court was further influenced by the fact that TSSAA's primary revenue source was gate receipts from tournaments between TSSAA member schools. *Id.* at 299, 121 S. Ct. 924. In conclusion, the Court stated that,

> to the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of

> secondary public schooling. There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms.

Id. at 299-300, 121 S. Ct. 924. The Court also found significant that TSSAA ministerial employees were treated like state employees by virtue of their eligibility for membership in the state retirement system. *Id.* at 300, 121 S. Ct. 924.

MHSAA, like TSSAA, is comprised primarily of public schools, and MHSAA's leadership is dominated by public school teachers, administrators, and officials. Students at MHSAA-member schools, like Tennessee students, may satisfy physical education requirements for high school by participating in MHSAA-sanctioned interscholastic sports. Because MHSAA, like TSSAA, is so entwined with the public schools and the state of Michigan, and because there is "such a close nexus between the State and the challenged action," MHSAA is a state actor. Tellingly, MHSAA argued earlier in this litigation, before the Supreme Court reversed the Sixth Circuit's opinion in *Brentwood Academy*, that "the nature and function of the MHSAA is virtually identical to that of the TSSAA." *Cmtys. for Equity*, 178 F. Supp. 2d at 847. MHSAA, in sum, has failed to present any compelling argument to distinguish itself from TSSAA. We therefore uphold the determination of the district court that MHSAA is a state actor.

2. Denial of equal protection

The Supreme Court has held that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive' justification for that action." *United States v. Virginia*, 518 U.S. 515, 531, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (dealing with the admission of women to the Virginia Military Institute, hereafter referred

to as *V.M.I.*). In *V.M.I.*, the Court further explained the state's burden under the heightened standard for gender-based classifications:

> To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Id. at 532-33, 116 S. Ct. 2264 (citation and quotation marks omitted).

The district court analyzed the scheduling of the Michigan athletic seasons under *V.M.I.*'s standard, determining that MHSAA had to show that scheduling team sports in different seasons based on gender "serves important governmental objectives and that this scheduling is substantially related to the achievement of those objectives." *Cmtys. for Equity*, 178 F. Supp. 2d at 850. In addition, the district court noted that MHSAA's justifications must be "exceedingly persuasive." *Id.* MHSAA asserted that the scheduling decisions sought to maximize girls' and boys' participation in athletics, arguing that the scheduling system maximizes opportunities for participation "by creating optimal use of existing facilities, officials and

coaches, thereby permitting more teams in a sport or more spots on a team." *Id.*

Conceding that MHSAA's logistical concerns were important, the district court concluded that MHSAA had failed to demonstrate, pursuant to the standards set forth in *V.M.I.*, that discriminatory scheduling was "'substantially related' to the achievement of those asserted objectives." *Id.* at 850-51. MHSAA's reliance upon anecdotal and "weak circumstantial" evidence was found insufficient to carry MSHAA's burden. The district court also pointed out that *even if* MHSAA had sufficiently proven their point about athletic participation opportunities, "that would not justify forcing girls to bear all of the disadvantageous playing seasons alone to solve the logistical problems." *Id.* at 851.

On appeal, MHSAA reiterates its argument made below that the purpose of separate athletic seasons for boys and girls is to maximize opportunities for athletic participation. MHSAA asserts that statistics showing that Michigan has a higher number of female participants in high school athletics than most states satisfies the requirements of *V.M.I.* It also argues that the "unavoidable consequence of separate teams was accommodation of twice the number of teams, games and participants." Although we acknowledge that schools in Michigan may have limited facilities, MHSAA's claim that the inadequate facilities require the female athletes to always play in the disadvantageous seasons is without merit. MHSAA could, after all, rearrange the schedules and require some of the male sports to play in disadvantageous seasons without increasing the overall use of the facilities.

The evidence offered by MHSAA, moreover, does not establish that separate seasons for boys and girls—let alone scheduling that results in the girls bearing all of the burden of playing during disadvantageous seasons—maximizes opportunities for participation. MHSAA simply states that bare participation statistics "are the link showing that separate seasons are substantially related to maximum participation." But a large gross-participation number alone

does not demonstrate that discriminatory scheduling of boys' and girls' athletic seasons is substantially related to the achievement of important government objectives.

MHSAA also argues that it cannot be liable under the Equal Protection Clause because there is no evidence that MHSAA acted with discriminatory intent. It points out that "[t]here is no evidence that MHSAA [] scheduled [] sports seasons because of 'sexual stereotypes' or as a result of any discriminatory purpose or intent." This argument appears to confuse intentional discrimination—i.e., an intent to treat two groups differently—with an intent to harm. As stated above, equal protection analysis requires MHSAA to show that its disparate treatment of male and female athletes "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *V.M.I.*, 518 U.S. at 532-33, 116 S. Ct. 2264. MHSAA's justifications for its actions must also be "exceedingly persuasive." *Id.*

Disparate treatment based upon facially gender-based classifications evidences an intent to treat the two groups differently. *V.M.I.* imposes no requirement upon CFE to show that an evil, discriminatory motive animated MHSAA's scheduling of different athletic seasons for boys and girls. The cases that MHSAA cites to the contrary, such as *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991), are inapposite because they involve facially *neutral* classifications, rather than facially *gender-based* classifications. In *Hernandez*, for example, the Court analyzed a racially neutral explanation for a prosecutor's exercise of peremptory strikes, noting that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 360, 111 S. Ct. 1859. The facts of the present case are quite different from those of *Hernandez*, and proof of a discriminatory motive is not necessary.

MHSAA asserts, however, that the "only facial classification at work in this case was the original decision to

have separate high school sports teams for boys and girls." Once the legality of separate programs has been conceded, MHSAA argues, issues regarding the implementation of those programs do not classify the players by gender. Conceding that separating boys and girls sports *is* a facial classification, MHSAA claims that other issues (scheduling, uniforms, coaches, etc.) are not prohibited facial classifications. If we were to find that any such difference between girls and boys sports is a facial classification, MHSAA argues, this would lead to absurd results. Facial classifications engender a presumption of discriminatory purpose, and MHSAA asserts that this is because there is typically a reason to infer antipathy—a reason, it claims, not present here.

MHSAA's characterization of the issue, however, misses the point. The issue is not whether *any* difference between male and female high school sports is deserving of being classified as a case of disparate treatment. Rather, the issue is whether the seasonal scheduling differences on the basis of gender that *result in unequal treatment* of women in comparison to men is considered disparate treatment. Disparate treatment does not arise from any and all differences in treatment; it occurs only where the offending party "*treats some people less favorably* than others because of their race, color, religion, sex, or national origin." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (emphasis added). Thus, the reason that scheduling differences properly receive disparate treatment analysis based on facial discrimination is not just because boys and girls are separated, but because they are separated and treated unequally in the scheduling of seasons.

In sum, MHSAA has failed to satisfy its burden of justifying its discriminatory scheduling practices under *V.M.I.* We therefore uphold the district court's grant of relief to CFE on the equal protection claim.

D. Title IX

1. Applicability of Title IX

Title IX, enacted as part of the Education Amendments of 1972, proscribes gender discrimination (with certain exceptions not applicable here) in educational programs receiving federal financial assistance. 20 U.S.C. § 1681(a). The statute provides, in pertinent part, that

> [n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

Before Title IX was amended by the Civil Rights Restoration Act in 1987, the statute was construed by the Supreme Court in *Grove City College v. Bell*, 465 U.S. 555, 574-75, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984), as being program specific, meaning that Title IX was interpreted as not providing institution-wide coverage. *See also Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 271 (6th Cir. 1994) (recounting the history of Title IX). Congress responded to the Supreme Court's holding in *Bell* by adding § 1687 to Title IX, which provides in pertinent part as follows:

> For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of –
>
> . . .
>
> (2)(B) a local educational agency, system of vocational education, or other school system; . . . *any part of which* is extended Federal financial assistance.

Horner, 43 F.3d at 271 (quoting 20 U.S.C. § 1687) (emphasis added by the court).

The legislative history concerning this amendment explains that Congress sought "to restore the broad scope of coverage and to clarify the application of title IX of the

Education Amendments of 1972 . . . ." S. Rep. No. 64, 100th Cong., 2d Sess. 4, *reprinted in* 1988 U.S.C.C.A.N. 3, 6. As stated in *Horner*, "the definitions of 'program or activity' and 'program' make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance." 43 F.3d at 271 (quoting S. Rep. No. 64, 100th Cong., 2d Sess. 4, *reprinted in* 1988 U.S.C.C.A.N. 3, 6) (quotation marks omitted).

MSHAA's brief on remand concedes that it is subject to Title IX. ("[MHSAA] represented to the Supreme Court that it would waive its argument that Title IX does not apply if the Court granted review of the preclusion issue. As a consequence, MHSAA does not now contest that it is subject to Title IX for purposes of this case."). Our only focus, then, is on whether MHSAA actually violated Title IX.

2. Intentional discrimination under Title IX

MHSAA contends that the district court erred in finding that MHSAA violated Title IX because, according to MHSAA, CFE had to offer proof of discriminatory animus on MHSAA's part. But this argument lacks merit for the same reasons that MHSAA's analogous argument regarding equal protection, discussed above, lacks merit. The district court noted that a Title IX violation, like an equal protection violation,

> does not require proof that the MHSAA intended to hurt girls and chose the scheduling system as a way to do that. The Court's task is to analyze the resulting athletic opportunities for girls and boys from the different treatment that they experience by being placed in different athletic seasons, and if girls receive unequal opportunities, Title IX has been violated.

Cmtys. for Equity, 178 F. Supp. 2d at 856. *Horner ex rel. Horner v. Kentucky High Sch. Ath. Ass'n*, 206 F.3d 685, 692 (6th Cir. 2000), relied upon by MHSAA, is inapposite

because it addressed a facially neutral policy challenged under a disparate-impact theory. The policy challenged in *Horner* allowed the introduction of a new sport only if 25% of the member schools indicated a willingness to participate. This is quite different than the explicit gender-based scheduling policy in effect here. We therefore agree with the district court that proof of a discriminatory motive is not required for a Title IX claim based upon disparate treatment, and uphold its judgment in finding that MHSAA is in violation of Title IX.

E. Michigan's Elliott-Larsen Civil Rights Act

MHSAA's next argument addresses Michigan's Elliott-Larsen Civil Rights Act, M.C.L.A. §§ 37.2101-37.2804, which, among other things, proscribes gender discrimination in the provision of public services and public accommodations. M.C.L.A. § 37.2302(a). Section 37.2302(a) provides in pertinent part as follows:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of . . . sex . . . .

The district court determined that MHSAA constitutes a "person" under the statute, defined as "[a]n individual, agent, association, corporation, . . . unincorporated association, the state or a political subdivision of the state, or any agency of the state, or any other legal or commercial entity." M.C.L.A. § 37.2103(g). MHSAA does not contest the conclusion of the district court on this point.

"Place of public accommodation" is defined in the statute as

> a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed

> or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.

M.C.L.A. § 37.2301(a).

And "public service" is defined as

> a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public . . . .

M.C.L.A. § 37.2301(b).

MHSAA argues that the district court erred in finding that MHSAA serves as a "public accommodation" and provides a "public service." The case most directly on point on these issues is *Rogers v. International Association of Lions Clubs*, 636 F. Supp. 1476, 1479 (E.D. Mich. 1986), where the district court found that a Lions Club qualified as a place of public accommodation providing public services. The Lions Club qualified as "a place of public accommodation" because its meetings are held in a public place (a Howard Johnson's restaurant), the meetings are open to the public, and the volunteer efforts of the Lions Club's members are made available to the public. *Id.* As the district court noted, MHSAA sponsors championship athletic tournament events that are held in public places and open to members of the general public. *Cmtys. for Equity*, 178 F. Supp. 2d at 859. Competitions are also held in public places for which MHSAA facilitates the scheduling. The district court in *Rogers* further considered whether the Lions Club provided a "public service." 636 F. Supp. at 1479. After noting that the Club is a tax-exempt, nonprofit private agency whose stated purpose is to provide volunteer public service through its members, the court concluded that the Club provides a public service. *Id.* MHSAA is likewise a tax-exempt entity that provides a service to the

public—"the organization of interscholastic athletics in the state's schools." *Cmtys. for Equity*, 178 F. Supp. 2d at 859. The district court therefore determined that MHSAA qualifies as providing a "public service" under Michigan law.

We conclude that the district court did not err in finding that MHSAA, like the Lions Club discussed in *Rogers*, qualifies as "providing a public service" and as a "place of public accomodation." MHSAA's unsupported contentions to the contrary are not persuasive. It cites *Sandison v. Michigan High School Athletic Association*, 64 F.3d 1026, 1036 (6th Cir. 1995), for example, to support its argument that it is not a "place of public accommodation." *Sandison*, however, is inapposite. Although this court in *Sandison* held that MHSAA was not a "place of public accommodation" within the meaning of the Americans with Disabilities Act (ADA), that was because the ADA narrowly defines "a place of public accommodation" as a "facility." *Id.* The ADA's definition differs from the broader definition under the Elliott-Larsen Civil Rights Act. Moreover, even if we were to hold that MHSAA is not a "place of public accommodation" under Elliott-Larsen, MHSAA would still be subject to the Act because it provides a "public service." We therefore uphold the determination of the district court that MHSAA is in violation of Michigan's Elliott-Larsen Civil Rights Act.

F. Compliance plan

After finding that MHSAA's scheduling of high school athletic seasons violated the Equal Protection Clause of the Fourteenth Amendment, Title IX, and Michigan's Elliott-Larsen Civil Rights Act, the district court ordered MHSAA to "bring its scheduling of the seasons of high school sports into compliance with the law by the 2003-2004 school year." *Cmtys. for Equity*, 178 F. Supp. 2d at 862. MHSAA was required to submit a compliance plan to the court by June 24, 2002. *Id.*

After MHSAA filed its proposed compliance plan, CFE and the Department of Justice filed responses, arguing that MHSAA's plan failed to remedy the inequities that existed in the scheduling of Michigan's high school athletics seasons. The Department of Justice noted that "the proposed Compliance Plan would perpetuate sex discrimination by requiring more than three times as many girls as boys to play in disadvantageous seasons and by addressing only sports, with the exception of boys' golf, offered by less than half of MHSAA's member schools."

In August of 2002, the district court rejected MHSAA's proposed plan as not achieving equality and offered MHSAA three options:

(1) combine all sports seasons so both sexes' teams play in the same season . . . and move girls' volleyball to its advantageous season of fall; or (2) reverse girls' basketball and volleyball; and in the Lower Peninsula, reverse two girls' seasons with two boys' seasons from among golf, tennis, swimming, and soccer; and in the Upper Peninsula, keep combined seasons in golf and swimming and reverse seasons in either tennis or soccer; or otherwise treat the Upper Peninsula the same as the Lower Peninsula; or (3) reverse girls' basketball and volleyball; and in both peninsulas, combine seasons in two sports, and reverse seasons in one of the two remaining sports at issue.

MHSAA selected the second option in the amended compliance plan that it filed with the district court in October of 2002.

Although MHSAA argues that the district court erred in rejecting its initial compliance plan, we must determine whether appellate jurisdiction exists to hear the issue before we can address the merits of this argument. CFE contends that MHSAA failed to appeal the compliance-plan order because MHSAA's January 2002 notice of appeal references only the opinion, judgment, and injunctive order entered in December of 2001. MHSAA did not file an amended notice of

appeal following the district court's rejection of MHSAA's initial compliance plan in August of 2002.

We lack jurisdiction over issues that are the subject of post-judgment motions when those issues are not included in a notice of appeal. In *United States v. Warner*, 10 F.3d 1236 (6th Cir. 1993), for example, this court held that "by being a distinct appealable order from which a separate appeal must be taken," a denial of a motion for new trial

> is subject to the requirement that the appeal be taken within ten days from the docketing of the district court's order. Absent an appeal within this time, or an extension from the district court for filing the notice of appeal, this court, being without authority to extend the time for filing a notice of appeal, will lack the jurisdiction to hear the appeal.

Id. at 1240. Because MHSAA did not file an amended notice of appeal following the district court's rejection of the initial compliance plan, we have no jurisdiction to consider MHSAA's argument concerning the same.

G. Judge Enslen's refusal to recuse himself

In 1983, MHSAA filed suit against the United States Department of Education and the Office of Civil Rights in the case of *Michigan High School Athletic Association v. Bell*, No. 83-CV-6250-AA (E.D. Mich. 1983), seeking a declaratory judgment and injunctive relief. Judge Enslen, the district court judge in the present case, recused himself from the 1983 case for reasons that no one, including Judge Enslen, can presently recall. MHSAA nevertheless argues that because Judge Enslen recused himself then, he should have recused himself now.

The evidence of record does not explain why Judge Enslen recused himself from the 1983 case. And in denying MHSAA's motion for disqualification in this case, Judge Enslen stated that he could think of no reason why he would be unable to remain impartial. Judge Enslen also noted that "only one of the 21 Defendants in the current case was a

party to the 1983 case, and none of the class Plaintiffs in the current case was involved in the 1983 case." Because MHSAA failed to provide any valid basis for Judge Enslen's recusal, we uphold the ruling of the district court denying its motion. *See Person v. General Motors Corp.*, 730 F. Supp. 516, 518-19 (W.D.N.Y. 1990) (stating that a judge's recusal in a prior case involving a party is not alone sufficient for disqualification in a later case involving that party).

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

DISSENT:

KENNEDY, Circuit Judge, concurring in part and dissenting in part. I agree with the majority's holding that MHSAA's scheduling of high school athletic seasons violates Title IX and the Elliot-Larsen Civil Rights Act. I write separately because I do not believe we are bound by the holding in *Lillard* and thus, the question of whether Title IX supplants equal protection claims brought pursuant to § 1983 is one of first impression in this circuit. After applying the test in *Smith v. Robinson*, and having due regard for the Supreme Court's direction that this case was to be "remanded...for further consideration in light of *Rancho Palo Verdes v. Abrams*" ("*Rancho*"), I conclude that Title IX supplants plaintiffs' gender-based equal protection claims brought pursuant to § 1983.

I. *The Effect of Lillard*

The majority finds that *Lillard v. Shelby County*, 76 F.3d 716 (6th Cir. 1996), is controlling and thus that the issue of whether Title IX supplants an equal protection claim brought pursuant to § 1983 has already been decided. Yet, the majority fails to distinguish the type of claims brought pursuant to § 1983. In *Lillard*, the issue was not whether Title IX precluded an *equal protection* claim, but whether it precluded a *substantive due process* claim.

Lillard was a sexual harassment case. This case is one of sexual discrimination. In *Lillard* the issue was whether Title IX precluded substantive due process claims brought pursuant to § 1983. In this case, the issue is whether Title IX precludes equal protection claims brought pursuant to § 1983. This is a key difference and one deserving of a separate analysis. As explained by one scholar:

> A victim of sexual harassment by a teacher would have several constitutional *Section 1983* claims against the teacher and the school district. She might bring claims based on: (1) the Fourteenth Amendment right to due process, alleging a denial of a fair hearing in which to bring her complaint; (2) *the liberty interest in bodily integrity under the substantive due process right in the Fourteenth Amendment*; and (3) *the right under the Equal Protection Clause of the Fourteenth Amendment to be free from discrimination on the basis of sex.* Because Title IX confers on plaintiffs a right to be free from discrimination on the basis of sex, the plaintiff's third Constitution-based Section 1983 claim is "virtually identical" to the right conferred by Title IX...
>
> A court confronted with these remaining Constitution-based Section 1983 claims must determine whether either claim is virtually identical to the right under Title IX against discrimination on the basis of sex...[N]either procedural nor substantive due process rights are identical to, or even virtually identical to, rights under Title IX, which affords protection against discrimination on the basis of sex. Consequently, if a plaintiff brings procedural and substantive due process claims under Section 1983, those claims would not be precluded by Title IX, for they do not satisfy the first prong of the Smith test.

Zwibelman, Michael, WHY TITLE IX DOES NOT PRECLUDE SECTION 1983 CLAIMS, 65 U. Chi. L. Rev. 1465, 1479 (Fall 1998); *see also* Burke, Beth, TO PRECLUDE OR NOT TO PRECLUDE, 78 Wash. U. L.Q. 1487, 1512 (noting that some courts fail to apply properly the "virtually identical" prong of the Smith test by "combin[ing] all the alleged constitutional violations without analyzing each claim separately under the *Smith* test"). While this is just one scholar's view regarding which type of constitutional claims should be precluded, it demonstrates the problem: this circuit has previously determined that due process claims are not "virtually identical" to Title IX claims, but we have not yet held that equal protection claims are not "virtually identical" to Title IX claims.

I believe we are required to do such a separate analysis under the Supreme Court's decision in *Smith v. Robinson*, 468 U.S. 992, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984). In *Smith*, the petitioners alleged violations of the Education of the Handicapped Act ("EHA") and of *both* equal protection and due process. Tellingly, the Court did not combine the alleged due process and equal protection violations in its discussion of preclusion; rather, the Court was prepared to analyze each claim separately. The Court first found that EHA claims were virtually identical to the claims brought under the Equal Protection Clause and that Congress intended that equal protection claims be precluded. Next, the Court was prepared to separately address "whether the procedural safeguards set out in the EHA manifest Congress' intent to preclude resort to § 1983 on a due process challenge." *Id.* at 1013-1014, 104 S. Ct. 3457. However, the Court found such analysis "unnecessary" because, even if the petitioners could maintain a due process challenge, they were not entitled to attorney's fees. The opinion in *Smith* illustrated that for each constitutional claim, a court must engage in a separate analysis of whether that claim, provided for by a statutory remedy, is precluded from being brought under § 1983, another statutory remedy.

Even though *Lillard* addressed the preclusion of different right, the majority holds we are bound by it. I see several problems with not addressing the precise issue before us. First, it contradicts the procedure set forth by the Court in *Smith*. For, if finding what Congress intended with respect to one constitutional claim - say equal protection - is enough to find what Congress intended with respect to all constitutional claims, then why was the Court prepared to do two separate analyses?[1] In other words, if the majority's position is correct, that a holding that Congress did not intend a statute to be the "exclusive avenue" for bringing one type of constitutional claim applies to all constitutional claims brought pursuant to § 1983, then, according to the majority, the Supreme Court was prepared to engage in a meaningless exercise of addressing whether "the procedural safeguards set out in the EHA manifest Congress' intent to preclude resort to § 1983 on a due process challenge." *Id.* According to the majority view, the Court had already decided this issue when it discussed what Congress intended with respect to equal protection claims.

Secondly, to say that what Congress intended with respect to one type of constitutional claim is what Congress meant with respect to all, is an overly-simplistic justification

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[1] The majority answers this question by acknowledging that the *Smith* Court "did in fact contemplate two separate analyses," but by reasoning that a separate analysis was warranted in *Smith* - and not in this case - because there was a "clear textual indication" in the EHA that Congress intended for that statute to preclude equal protection claims brought pursuant to § 1983. Op. at 9. By distinguishing *Smith* in this way, the majority is treating implied rights as second-class rights as they are undeserving of a separate analysis. The Court has not indicated in either *Smith* or *Sea Clammers* that implied rights are to be treated differently than express and I decline to do so here. For, as I explain later, once we include the implied rights to bring individual actions, including damages, as what Congress intended and read Title IX to so provide, Congress has provided a statutory remedy for gender-based equal protection claims so that § 1983 is not available for equal protection actions.

for the majority's decision. When ascertaining Congress' intent, I believe we have to do so with the precise rights in mind. I do not think one can assume that simply because Congress did not intend to preclude substantive due process claims, it did not intend to preclude equal protection claims. It seems clear to me that Congress could intend to preclude one type of constitutional claim, by providing a statutory remedy for it, but not others.

In *Lillard* this court found the claims at issue were not "virtually identical" to those provided in Title IX. *Lillard*, 76 F.3d at 723. I agree, as the plaintiff in *Lillard* alleged sexual harassment and Title IX was designed to target gender discrimination. While I recognize the court in *Lillard* summarily concluded these claims were not "virtually identical," that does not take away from the fact that because the claims were so different, there is further reason to assume Congress did not intend to preclude the use of § 1983. Similarly, where the claims are "virtually identical," as I believe they are in this case, there seems to me more reason to assume Congress intended to preclude use of § 1983 to enforce those claims. Thus, when a court finds the first part of the *Smith* test is not satisfied (are the claims virtually identical), the answer to the second (did Congress intend that the statute supplant the constitutional claims), seems obvious. It only makes sense to conclude that when a constitutional claim is not virtually identical to the statutory claim, Congress did not intend to preclude the former.

Third, it is important to point out that the court in *Lillard* did not indicate its holding was to be extended to the preclusion of rights other than substantive due process. The court in *Lillard* concluded that the rights were not "virtually identical" but then went on to discuss, at length, congressional intent. The court reasoned that because the private right of action found in Title IX was implied, rather than express, Congress did not intend to preclude due process claims when it enacted Title IX. There was no indication that this logic regarding implied rights was meant

to extend to other constitutional rights beyond substantive due process. The court limited its finding, stating, "the *National Sea Clammers* doctrine presents no impediment to the plaintiffs' pursuit of remedies for alleged violations of *substantive due process*." *Lillard*, 76 F.3d at 724 (emphasis added). More importantly, the court indicated its finding regarding congressional intent was dicta, concluding that, "*even if* the defendants' argument had been directed at an attempt by the plaintiffs to enforce their Title IX rights, rather than their constitutional rights, through section 1983, *National Sea Clammers* would have provided no support." *Lillard*, 76 F.3d at 723 (emphasis added).[2]

For the foregoing reasons, I believe that we need to engage in a separate analysis as required by the Supreme Court in *Smith* and that we must address this issue as one of first impression in this circuit.

II. *Applying Smith v. Robinson's Two-Prong Test*

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[2] The defendants in *Lillard* argued that due process claims brought pursuant to § 1983 should be precluded by Title IX under the *Sea Clammers* doctrine. The *Lillard* court pointed out that *Sea Clammers* did not apply to the preclusion of constitutional claims, only the preclusion of statutory claims, stating:

> There are two important distinctions that make the *National Sea Clammers* doctrine inapposite here. First, and most crucial, is the fact that in *National Sea Clammers*, the plaintiffs' section 1983 action sought to enforce the rights created by federal statutes which did not provide for a private right of action, while here, the plaintiffs' section 1983 claims are premised on alleged *constitutional* violations. Thus, while in *National Sea Clammers*, allowing the section 1983 action to enforce the rights at issue would have effectively circumvented the implicit congressional intention to foreclose private rights of action, here, the plaintiffs' section 1983 action does not attempt either to circumvent Title IX procedures, or to gain remedies not available under Title IX... Instead, the plaintiffs seek to enforce wholly independent, and totally distinct, substantive due process rights.

Lillard, 76 F.3d at 722-723 (citation omitted).

In *Smith*, the Supreme Court established a two-prong test for determining whether § 1983 claims predicated on constitutional rights are precluded by statute: first, courts must address whether the rights underlying the § 1983 claim are "virtually identical" to the rights in the relevant statute; second, courts must address whether Congress intended the statute to be the "exclusive avenue" for asserting those rights. 468 U.S. at 1009, 104 S. Ct. 3457. As discussed, I believe the rights conferred in Title IX - to be free from discrimination on the basis of sex - are virtually identical to those granted in the Equal Protection Clause. The next issue then, and the one requiring further analysis, is whether Congress intended Title IX to be the "exclusive avenue" for bringing those gender-based equal protection claims. In other words, by enacting Title IX, did Congress intend to preclude reliance on § 1983, a separate statute, to remedy an equal protection violation? Smith, 468 U.S. at 1012, 104 S. Ct. 3457.

As a preliminary matter, I want to express my disagreement with the rationale behind one holding in *Lillard* that Title IX does not supplant due process claims brought pursuant to § 1983. The court reasoned that because the private right of action was *implied* rather than express, Congress did not intend it to be the exclusive avenue for bringing constitutional claims. I find this reasoning unpersuasive for two reasons. First, I believe it undermines the Supreme Court's decision in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979). In *Cannon*, the Court found Congress intended to create a private judicial remedy in Title IX and we should not second-guess that holding. The intent found by the Supreme Court, although implied, should be given the same weight as expressed intent. Second, the opinion in *Lillard* is silent with respect to the fact that *after* the Supreme Court's holding in *Cannon*, but prior to the decision in *Lillard*, Congress essentially ratified the Supreme Court's holding in *Cannon* by subsequently

enacting two legislative provisions which did not interfere with the implied right, the Civil Restoration Act of 1987 and the Rehabilitation Act Amendments of 1986. This point was acknowledged by the Supreme Court in *Franklin v. Gwinnett County Public Schools*, where the Court held a person could receive both compensatory and punitive damages in a private action for sex discrimination. *Franklin*, 503 U.S. 60, 72, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992). The Court noted that while Congress had an opportunity to abrogate the implied right of action found in *Cannon*, it remained silent stating, "[o]ur reading of the two amendments to Title IX enacted after *Cannon* leads us to conclude that Congress did not intend to limit the remedies available in a suit brought under Title IX," *id.*, and later that:

> In seeking to correct what it considered to be an unacceptable decision on our part in *Grove City College v. Bell*, Congress made no effort to restrict the right of action recognized in *Cannon* and ratified in the 1986 Act or to alter the traditional presumption in favor of any appropriate relief for violation of a federal right. We cannot say, therefore, that Congress has limited the remedies available to a complainant in a suit brought under Title IX.

Id. at 73, 112 S. Ct. 1028. Thus, I am not persuaded by the argument that because the private right of action in Title IX was implied by the Supreme Court, this court is prevented from finding Congress intended Title IX to supplant gender-based equal protection claims. With this in mind, I now address whether Congress intended to preclude equal protection gender-based § 1983 claims.

In ascertaining Congress' intent in this case, I believe we should first look to the decision the Supreme Court asked us to consider on remand, *Rancho Palos Verdes*. 544 U.S. 113, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (2005). I agree

with the majority's finding that the case before us is a *Smith* case rather than a *Sea Clammers* case in that it deals with both constitutional and statutory rights. Further, I agree that *Rancho* is a *Sea Clammers* decision. However, I still believe that we should consider the Court's holding in *Rancho*, specifically, the potential reach of the Court's holding.

Prior to *Rancho*, courts applied no inference regarding congressional intent. The Court in *Rancho* changed that and, where a judicial remedy exists in a statute, made it much easier to infer that Congress intended to preclude reliance on § 1983. While the Court declined to hold that the "availability of a private judicial remedy...conclusively establishes a congressional intent to preclude § 1983 relief," *id.* at 1459, the Court did state that the availability of such a remedy in the statute would give rise to an, " *ordinary inference* that the remedy provided in the statute is exclusive," but such an inference, "can surely be overcome by textual indication, express or implicit, that the remedy is to complement, rather than supplant, § 1983" *id.* at 1459 (emphasis added). Again, I recognize that factually *Rancho* is analogous to *Sea Clammers* in that it involved two statutes. However, worth mentioning, is the fact that the reasoning behind this inference was not limited to *Sea Clammers* cases. Rather, the Court spoke at length about *both Sea Clammers* and *Smith* in articulating this rule:

> We have found § 1983 unavailable to remedy violations of federal statutory rights in two cases: *Sea Clammers* and *Smith*. Both of those decisions rested upon the existence of more restrictive remedies provided in the violated statute itself...
>
> The Government as *amicus*, joined by the City, urges us to hold that the availability of a private judicial remedy is not merely indicative of, but conclusively establishes, a congressional intent to preclude § 1983 relief. We decline to do so.

Rancho Palos Verdes, 125 S. Ct. at 1459 (citations omitted). Because the Court analyzed *Sea Clammers* (only statutory claims) and *Smith* (statutory and constitutional claims) and their progeny and found that in both types of cases the pivotal issue was whether the statute at issue provides for a private judicial remedy, the discussion leading up to the establishment of the inference adopted in *Rancho* suggests that it does not apply solely to *Sea Clammers* cases. There is an argument that such an inference applies to *Smith* cases as well. Yet, as this case can be decided under the standard set forth in *Smith*, I find it unnecessary to apply the *Rancho holding* to decide this case; however, I believe the *reasoning* in *Rancho* suggests we should conclude that Congress, by enacting Title IX, intended to preclude reliance on § 1983 as a remedy for an equal protection claim.

Again, under the test in *Smith*, we must ask whether Congress intended Title IX to be the "exclusive avenue" through which a plaintiff may assert an equal protection claim. I believe we must address this question with the relevant Supreme Court decisions in mind. In *Cannon*, the Supreme Court applied the four-factor test of *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975), to hold that Title IX created a private right of action. The second *Cort* factor asks whether "any indication of legislative intent, explicit or implicit, either to create a remedy or deny on" exists. *Id.* The court in *Cannon* found that,"[f]ar from evidencing any purpose to deny a private cause of action, the history of Title IX rather plainly indicates that Congress intended to create such a remedy." *Cannon*, 441 U.S. at 694. In *Franklin*, the Court went on to hold that "Congress did not intend to limit the remedies available in a suit brought under Title IX." *Franklin*, 503 U.S. at 72, 112 S. Ct. 1028. Finally, in *Rancho* the Court established the above-discussed inference. Again, while we need not extend the *Rancho* holding to *Smith* cases, I believe the *reasoning* sheds some light on how we should dispose of the case before us. As emphasized by the Supreme Court, the central

issue in both *Smith* and *Sea Clammers* cases has been, and is, whether the statute at issue provides for a judicial remedy:

> [I]n *all* of the cases in which we have held that § 1983 *is* available for a violation of a federal statute, we have emphasized that the statute at issue, in contrast to those in *Sea Clammers* and *Smith, did not* provide a private judicial remedy (or, in most cases, even a private administrative remedy) for the rights violated.

Rancho, 125 S. Ct. at 1459. Title IX, like the statutes at issue in *Sea Clammers* and *Smith*, does provide for both a private right of action and for damages. Thus, because the Supreme Court has held Congress intended to create a private judicial remedy in Title IX, and because the non-existence of such a remedy has repeatedly given rise to a finding that Congress did not intend to preclude relief sought through § 1983, I would hold that Congress did intend for Title IX to be the "exclusive avenue" through which a plaintiff may assert a gender-based equal protection claim.

SUPREME COURT OF THE
UNITED STATES

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC., ON BEHALF OF ITSELF AND ITS MEMBERS, PETITIONER v. COMMUNITIES FOR EQUITY, ON BEHALF OF ITSELF, ITS MEMBERS AND ALL OTHERS SIMILARLY SITUATED, ET AL.

No. 04-1021

May 2, 2005, Decided

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

Motion of Michigan Interscholastic Athletic Administrators Association for leave to file a brief as amicus curiae granted. Motion of Michigan Association of School Boards for leave to file a brief as amicus curiae granted. Motion of Basketball Coaches Association of Michigan for leave to file a brief as amicus curiae granted. Motion of National Federation of State High School Associations for leave to file a brief as amicus curiae granted. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 161 L. Ed. 2d 316, 125 S. Ct. 1453 (2005).*

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT

COMMUNITIES FOR EQUITY, on behalf of itself, its members and all those similarly situated; Diane Madsen, on behalf of her minor daughters and all those similarly situated; and Jay Roberts-Eveland, on behalf of her minor daughter and all those similarly situated,
Plaintiffs-Appellees,

v.

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC., on behalf of itself and its members,
Defendant-Appellant.

No. 02-1127

Argued: June 17, 2004.
Decided and Filed: July 27, 2004.
Rehearing En Banc Denied November 9, 2004.

Before: KENNEDY and GILMAN, Circuit Judges; SHADUR, District Judge.*

OPINION

GILMAN, Circuit Judge.

Communities for Equity—an organization of parents and high school athletes that advocates on behalf of Title IX compliance and gender equity in athletics—and the individual plaintiffs (collectively, CFE) brought a class

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* The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

action lawsuit against the Michigan High School Athletic Association (MHSAA), arguing that MHSAA's scheduling of high school sports seasons in Michigan discriminated against female athletes on the basis of gender. The district court concluded that MHSAA's actions violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title IX of the Educational Amendments of 1972, and Michigan's Elliott-Larsen Civil Rights Act. For the reasons set forth below, we AFFIRM the judgment of the district court with regard to the plaintiffs' Equal Protection claim, thus finding no need to reach the Title IX and state-law issues.

I. BACKGROUND

A. Factual background

At issue in this case is whether MHSAA's scheduling of athletic seasons and tournaments for six girls' sports—basketball, volleyball, soccer, Lower Peninsula golf, Lower Peninsula swimming and diving, and tennis—violates the law. With the exception of golf, all of these sports are scheduled during the nontraditional season (meaning a season of the year that differs from when the sport is typically played). *Cmtys. for Equity v. Michigan High Sch. Athletic Ass'n.*, 178 F.Supp 2d 805, 807 (W.D.Mich.2001). Although Lower Peninsula girls' golf is played in the spring—the traditional season for golf—the fall season, when the boys play, is more advantageous. *Id.* No boys' sports are scheduled in nonadvantageous seasons. *Id.* at 838.

Girls have historically played in the less advantageous seasons because of the way that high school athletics developed in Michigan. MHSAA's executive director, John Roberts, explained in a 1990 article titled *Sports and Their Seasons*, published in MHSAA's Bulletin, that "[b]oys' sports were in [MHSAA member] schools first and girls' sports, which came later, were fitted around the pre-existing boys program." *Id.* at 815.

In its findings of fact, the district court painstakingly discussed each sport at issue and analyzed why play in the nontraditional season (or, in the case of golf, in the traditional season) harmed female athletes. *Id.* at 817-836. Among the harms found by the district court are the following:

> [G]irls' basketball [is played] in the fall. Forty-eight states schedule girls' basketball in the winter....
>
> Michigan's female high school basketball players do not get to participate in "March Madness" or the excitement and publicity surrounding this time period when the rest of the country's high schools and colleges are participating in championship basketball tournaments....
>
> Kristi Madsen said that not being able, as a high school basketball player, to participate in the "March Madness" hype made her feel "[a]ngry. I didn't like it. Again, the guys get a ton of special perks or attention because it's 'March Madness' and because they are playing in March, during 'March Madness.'"...
>
> Michigan girls have decreased ability to be nationally ranked or obtain All-American honors because they play basketball during the non-traditional fall season....
>
> [I]t is undisputed that if Michigan girls played basketball during the winter season, they would, at the very least, be on 'equal footing' with Michigan boys and with girls in the rest of the country with respect to collegiate recruiting....
>
> In volleyball, the non-traditional season is the disadvantageous season for girls....

Michigan high school girls' volleyball is played in the winter season.

The traditional playing season for women's volleyball is the fall. Forty-eight states play high school girls' volleyball in the fall. The NCAA schedules women's volleyball in the fall. Although the MHSAA does not currently sponsor boys' volleyball, the MHSAA's executive staff and volleyball committee have recommended that once the sport is adopted, it be played in the spring when the NCAA schedules men's volleyball.

College volleyball recruiting focuses on the amateur, private club programs, like those sponsored by an organization called the United States Volleyball Association (USAV), rather than the high school programs ...

The USAV and AAU, another private club program, seasons for high school age players to play in their amateur programs are from January through June or July. MHSAA rules prohibit athletes from participating in USAV or AAU club volleyball during their December through March high school season.

Michigan girls who participate in high school volleyball are not able to participate in USAV club volleyball until April, after the MHSAA season has ended, while players in other states have been playing club volleyball since January. The MHSAA prohibits students from playing on any team other than a school team during the MHSAA-defined season in that sport. By the end of the MHSAA season, most of the regional and national USAV tournaments have been filled by non-Michigan teams. When there are

openings, Michigan club teams are placed "at the very bottom of the tournament where they do not get a chance to compete at the high levels because they haven't been competing...." Michigan club teams have difficulty excelling at these tournaments because they are becoming accustomed to playing with new teammates and a new coach while their competitors have already been playing together for four months. It is therefore more difficult for recruiters to evaluate Michigan players at these tournaments....

[T]he Court finds that the spring season is the inferior season, as compared to fall, for playing soccer in Michigan....

The NCAA schedules women's soccer in the fall....

The MHSAA schedules the boys' soccer state championship tournament in the fall, at the same time that the NCAA schedules men's soccer....

The MHSAA's scheduling of girls' soccer in the spring in Michigan disadvantages girls in several ways. Soccer fields in Michigan are often still frozen or snow-covered when the girls' season starts in the spring, so girls are forced inside for practice and tryouts. Thus, the regular season starts later than scheduled. As a result, Michigan girls must play three games a week over the course of the season to make up postponed games whereas Michigan boys play two games per week over the course of their season.

The increased number of games per week causes a greater risk of injury for girls that Michigan boys do not face....

Girls' opportunities for collegiate recruitment are decreased because college scholarships for soccer are awarded in November and April. Recruiters will not have had an opportunity to see female soccer players in Michigan in their senior year of high school before awarding first-round November scholarships because girls start their competitive season in late March. Michigan boys play during the fall season and are able to have four years of high school competition for college recruiters to consider....

The court finds that in Michigan, fall is the more advantageous season for playing high school golf....

Lower Peninsula girls' golf [is played] in the spring season....

Lower Peninsula boys' golf used to be in the spring, but the MHSAA moved it to the fall season in the 1970s so that boys' golf teams would have better access to golf courses. The MHSAA scheduled Lower Peninsula girls' golf in the spring, which was the season it had previously determined was less advantageous when it moved boys' golf.

In addition, because the NCAA letter of intent signing date is in early November, Michigan boys have four years of golf experience and scores on which to be evaluated. Michigan girls only have three years because their season occurs after the letter of intent signing date ....

> The Court finds that the winter season for swimming has advantages that outweigh advantages to swimming in fall....
>
> [T]he Lower Peninsula girls' swimming and diving season [is] in the fall.
>
> [The] Lower Peninsula boys' swimming and diving season [is] in the winter.
>
> [T]he winter season is more advantageous than fall for swimming. For one reason, Michigan boys are able to go straight from the high school swimming season to the club tournaments, whereas Michigan girls have a gap in competition because their season has ended in November. Sectional and regional swim meets for U.S. Swimming take place in March. The Phillips 66 national swim championships are in March/April of each year. In diving, junior nationals are in March, so girls face a gap in competition between the end of their fall interscholastic season and open amateur competition....
>
> [T]he Court finds that spring is the more advantageous playing season for tennis....
>
> [Michigan] girls' tennis [is played] in the fall.
>
> Boys' high school tennis immediately precedes the United States Tennis Association (USTA) summer tennis tournament circuit, so boys have the advantage of high school practice, competition, and coaching before participating in the circuit and are better prepared for the summer circuit, where college coaches watch play....

Id. at 817-836.

In addition to sport-specific harms, the district court found that the scheduling of seasons harmed Michigan girls

in ways that could be generalized across all sports. For example, "[w]hen girls are treated unequally as compared to boys, girls receive the psychological message that they are 'second-class' or that their athletic role is of less value than that of boys." *Id.* at 837.

The above-quoted findings are only a fraction of the harms that the district court found are experienced by female athletes in Michigan because of MHSAA's scheduling their seasons of play at disadvantageous times. A full recounting takes up 30 pages of the district court's opinion. *Id.* at 809-39.

MHSAA was founded in 1924 "to exercise control over the interscholastic athletic activities of all schools of the state through agreement with the Superintendent of Public Instruction." *Id.* at 810 (quotation marks omitted). MHSAA's Articles of Incorporation further illuminate that the purpose of MHSAA is

> to create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state consistent with [the] educational values of the high school curriculums...

Id. at 811 (quotation marks omitted). Membership in MHSAA is open to all secondary schools in Michigan. To join MHSAA, a school district's board of education must agree to adopt MHSAA's rules and regulations "as its own and agree[] to primary enforcement of such rules as to its own schools." *Id.* (quotation marks omitted). Over 700 Michigan schools constitute the membership of MHSAA, more than 80% of which are public. *Id.* at 810.

Ticket sales to the state championship tournaments represent 86% of MHSAA's budget. *Id.* at 813. MHSAA member schools remit substantial portions of the gate receipts from their participation in the tournament events to MHSAA. *Id.* Other sources of revenue include tournament concessions, fees from the registration of game officials, advertising in tournament programs, corporate sponsorship,

and royalties from television and radio broadcasts of MHSAA tournament events. *Id.*

General control over interscholastic athletic policies is vested in the Representative Council. *Id.* at 812. Nineteen voting members constitute the Council, fourteen of whom are elected by member schools, four of whom are appointed by the Council, and one of whom is a representative of the State Superintendent of Education. *Id.* All members of the Council, with the exception of the representative of the State Superintendent, must be either members of the faculty or board of education of MHSAA-member schools. *Id.* Seventeen of the nineteen members of the Council in 2000-2001 were either employees or representatives of public schools or public school districts. *Id.*

The district court found that high school athletic seasons in Michigan are determined by MHSAA. *Id.* at 814. MHSAA prescribes when practice and competition may start, when competition ends, and the maximum number of games that may be played. Practice outside of the dates set by MHSAA is prohibited. Member schools are not permitted to engage in any competition after the end of the MHSAA season or the end of the state championship tournament in any sport, whichever is last. According to MHSAA rules, athletes may not participate in both interscholastic and amateur club sports in the same sport during the same season. Within the MHSAA-determined seasons, member schools set their own practice schedules and game dates. *Id.*

State championship tournaments are sponsored by MHSAA in twelve boys' sports and twelve girls' sports. *Id.* Only MHSAA-member schools who comply with MHSAA's rules and regulations may participate in these tournaments. *Id.*

B. Procedural background

In June of 1998, CFE filed the present lawsuit, alleging that MHSAA discriminated against female athletes. The district court denied two successive motions for summary judgment filed by MHSAA. MHSAA then filed a motion to

dismiss, which was granted in part, dismissing all of CFE's disparate-impact claims.

From September 24 through October 4, 2001, the district court conducted a bench trial on the remaining claims. The court handed down its decision on December 17, 2001, holding that MHSAA's scheduling of female sports seasons violated the Equal Protection Clause of the Fourteenth Amendment, Title IX (20 U.S.C. §§ 1681-1688), and Michigan's Elliott-Larsen Civil Rights Act (Mich. Comp. Laws Ann. §§ 37.2101-37.2804). *Cmtys. for Equity*, 178 F.Supp 2d at 862.

As part of its ruling, the district court enjoined MHSAA from continuing its current scheduling of interscholastic athletics seasons in Michigan. The court retained jurisdiction over the case, ordering MHSAA to submit a Compliance Plan so that an appropriate remedy could be implemented. *Id.* MHSAA's initial Compliance Plan was rejected by the court, but a revised plan was filed by MHSAA in October of 2002 and subsequently approved.

II. ANALYSIS

A. Standard of review

Questions of constitutional interpretation are issues of law, which we review de novo. *Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir.2004). The district court's findings of fact, on the other hand, will not be set aside unless they are determined to be clearly erroneous. *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 519 (6th Cir.2003).

B. Equal Protection

1. State action

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Pursuant to 42 U.S.C. § 1983,

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

An entity or individual charged under § 1983 with a Fourteenth Amendment violation must be a "state actor." *LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1111 (6th Cir.1995) ("To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class.") (quotation marks and citation omitted). As a threshold issue, therefore, we must determine whether MHSAA is a state actor.

In determining that MHSAA is a state actor, the district court relied upon the United States Supreme Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 121 S. Ct. 924, 148 L.Ed.2d 807 (2001). *Cmtys. for Equity*, 178 F.Supp 2d at 846-848. The *Brentwood Academy* case addressed the issue of whether the Tennessee Secondary School Athletic Association (TSSAA), which was "incorporated to regulate interscholastic athletic competition among public and private secondary schools," engaged in state action when it enforced one of its rules against a member school. *Id.* at 290, 121 S. Ct. 924. Because of "the pervasive entwinement of state school officials in the structure of the association," the Court held that TSSAA's regulatory activity constituted state action. *Id.* at 291, 121 S. Ct. 924. The Court acknowledged that the analysis of whether state action existed was a "necessarily fact-bound inquiry," *id.* at 298, 121 S. Ct. 924 (quotation marks omitted), and noted that

state action may be found only where there is "such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Id.* at 295, 121 S. Ct. 924 (quotation marks omitted).

Public schools constituted 84% of TSSAA's membership, the Court noted, and school faculty and administrators provided TSSAA's leadership. *Id.* at 298, 121 S. Ct. 924. The Court was also influenced by the fact that TSSAA's primary revenue source was gate receipts from tournaments between TSSAA-member schools. *Id.* at 299, 121 S. Ct. 924. In conclusion, the Court stated that,

> to the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling. There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms.

Id. at 299-300, 121 S. Ct. 924. The Court also found significant that TSSAA ministerial employees were treated like state employees by virtue of their eligibility for membership in the state retirement system. *Id.* at 300, 121 S. Ct. 924.

MHSAA's stated purpose, "[t]o create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state," is virtually identical to that of its Tennessee counterpart. *See id.* at 290, 121 S. Ct. 924. Like TSSAA, MHSAA's membership is composed primarily of public schools. And, similar to TSSAA, public school teachers, administrators, and officials dominate MHSAA's leadership. Another common feature is that the bulk of MHSAA's revenue comes from ticket sales for state

championship tournaments. Finally, MHSAA employees who had state teaching certificates were, until January of 1988, considered state employees and were therefore eligible to participate in the state's retirement system. Employees who started working for MHSAA before January of 1988 continue to be members of the state employees' retirement system. *Cmtys. for Equity*, 178 F.Supp 2d at 813.

We therefore conclude that MHSAA is so entwined with the public schools and the state of Michigan, and that there is "such a close nexus between the State and the challenged action," *Brentwood Academy*, 531 U.S. at 295, 121 S. Ct. 924 (quotation marks omitted), that MHSAA should be considered a state actor. Tellingly, MHSAA argued earlier in this litigation, before the Supreme Court reversed this court's opinion in *Brentwood Academy*, 180 F.3d 758 (6th Cir.1999), that "the nature and function of the MHSAA is virtually identical to that of the TSSAA." *Cmtys. for Equity*, 178 F.Supp 2d at 847. MHSAA, in sum, has failed to present any compelling argument to distinguish itself from TSSAA. We therefore affirm the determination of the district court that MHSAA is a state actor.

2. Denial of Equal Protection

The Supreme Court has held that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531, 116 S. Ct. 2264, 135 L.Ed.2d 735 (1996) (dealing with the admission of women to the Virginia Military Institute, hereafter referred to as *VMI*). In *VMI*, the Court further explained the State's burden under the heightened standard for gender-based classifications:

> To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the

> reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Id. at 532-33, 116 S. Ct. 2264 (quotation marks and citations omitted).

The district court analyzed the scheduling of the Michigan athletic seasons under *VMI's* standard, determining that MHSAA had to show that scheduling team sports in different seasons based on gender "serves important governmental objectives and that this scheduling is substantially related to the achievement of those objectives." *Cmtys. for Equity*, 178 F.Supp 2d at 850. In addition, the district court noted that MHSAA's justifications must be "exceedingly persuasive." *Id.* (quotation marks omitted). MHSAA asserted that the scheduling decisions were designed to maximize girls' and boys' participation in athletics, arguing that the scheduling system maximizes opportunities for participation "by creating optimal use of existing facilities, officials and coaches, thereby permitting more teams in a sport or more spots on a team." *Id.*

Conceding that MHSAA's logistical concerns were important, the district court concluded that MHSAA had failed to demonstrate, pursuant to the standards set forth in *VMI*, that discriminatory scheduling was "'substantially related' to the achievement of those asserted objectives."

Id. at 850-51. MHSAA's reliance upon anecdotal and "weak circumstantial" evidence was found insufficient to carry its burden. The district court also pointed out that *even if* MHSAA had sufficiently proven the point about athletic-participation opportunities, "that would not justify forcing girls to bear all of the disadvantageous playing seasons alone to solve the logistical problems." *Id.* at 851.

On appeal, MHSAA reiterates its argument made below that the purpose of separate athletic seasons for boys and girls is to maximize opportunities for athletic participation. MHSAA asserts that statistics showing that Michigan has a higher number of female participants in high school athletics than most states satisfies the requirements of *VMI*. An "unavoidable consequence of separate teams," according to MHSAA, "was accommodation of twice the number of teams, games and participants."

The evidence offered by MHSAA, however, does not establish that separate seasons for boys and girls—let alone scheduling that results in the girls bearing all of the burden of playing during disadvantageous seasons—maximizes opportunities for participation. MHSAA argues that bare participation statistics "*are the link* showing that separate seasons are substantially related to maximum participation." (Emphasis added.) But a large gross participation number alone does not demonstrate that discriminatory scheduling of boys' and girls' athletic seasons is substantially related to the achievement of important government objectives.

MHSAA also contends that it cannot be liable under the Equal Protection Clause because there is no evidence that MHSAA acted with discriminatory intent. It points out that "[t]here is no evidence that MHSAA [] scheduled [] sports seasons because of 'sexual stereotypes' or as a result of any discriminatory purpose or intent." This argument appears to confuse intentional discrimination—i.e., an intent to treat two groups differently— with an intent to harm. As stated above, Equal Protection analysis requires MHSAA to show

that its disparate treatment of boys and girls "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *VMI*, 518 U.S. at 533, 116 S. Ct. 2264.

Disparate treatment based upon facially gender-based classifications evidences an intent to treat the two groups differently. *VMI* imposes no requirement upon CFE to show that an evil, discriminatory motive animated MHSAA's scheduling of different athletic seasons for boys and girls. The cases that MHSAA cites to the contrary, such as *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L.Ed.2d 395 (1991), are inapposite because they involve facially neutral classifications, rather than facially gender-based classifications. In *Hernandez*, for example, the Court analyzed a racially-neutral explanation for a prosecutor's exercise of peremptory strikes in picking a jury, noting that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 360, 111 S. Ct. 1859. The facts of the present case are quite different from those of *Hernandez*.

In sum, we do not find that MHSAA's justification for its scheduling practices is "exceedingly persuasive" in meeting the heightened standard required by *VMI* for the gender-based classifications. *See VMI*, 518 U.S. at 532-33, 116 S. Ct. 2264. We therefore affirm the district court's grant of relief to CFE on the Equal Protection claim.

C. Compliance Plan

Upon finding that MHSAA's scheduling of high school athletic seasons violated the Equal Protection Clause of the Fourteenth Amendment, Title IX, and Michigan's Elliott-Larsen Civil Rights Act, the district court ordered MHSAA to "bring its scheduling of the seasons of high school sports into compliance with the law by the 2003-2004 school year." *Cmtys. for Equity*, 178 F.Supp 2d at 862. MHSAA was

required to submit a Compliance Plan to the court by June 24, 2002. *Id.*

After MHSAA filed its proposed Compliance Plan, CFE and the Department of Justice filed responses, arguing that MHSAA's plan failed to remedy the inequities that existed in the scheduling of Michigan's high school athletics seasons. The Department of Justice noted that "the proposed Compliance Plan would perpetuate sex discrimination by requiring more than three times as many girls as boys to play in disadvantageous seasons and by addressing only sports, with the exception of boys' golf, offered by less than half of MHSAA's member schools."

In August of 2002, the district court rejected MHSAA's proposed plan as not achieving equality. The court offered MHSAA three options:

> (1) combine all sports seasons so both sexes' teams play in the same season ... and move girls' volleyball to its advantageous season of fall; or (2) reverse girls' basketball and volleyball; and in the Lower Peninsula, reverse two girls' seasons with two boys' seasons from among golf, tennis, swimming, and soccer; and in the Upper Peninsula, keep combined seasons in golf and swimming and reverse seasons in either tennis or soccer; or otherwise treat the Upper Peninsula the same as the Lower Peninsula; or (3) reverse girls' basketball and volleyball; and in both peninsulas, combine seasons in two sports, and reverse seasons in one of the two remaining sports at issue.
>
> MHSAA selected the second option in the amended Compliance Plan that it filed with the district court in October of 2002. The amended plan was approved by the court the following month.

MHSAA contends that the district court erred in rejecting MHSAA's initial Compliance Plan. Before we can address the merits of this argument, however, we must

determine whether appellate jurisdiction exists to hear the issue.

CFE argues that MHSAA failed to appeal the Compliance Plan order, pointing out that MHSAA's January 2002 Notice of Appeal references only the opinion, judgment, and injunctive order entered in December of 2001. MHSAA did not file an amended Notice of Appeal following the district court's rejection of its initial Compliance Plan in August of 2002.

The appellate courts lack jurisdiction over issues that are the subject of post-judgment motions, such as a motion for a new trial, when arguments in those motions are not included in a Notice of Appeal. In *United States v. Warner*, 10 F.3d 1236 (6th Cir.1993), for example, this court held that "by being a distinct appealable order from which a separate appeal must be taken," a denial of a motion for new trial

> is subject to the requirement that the appeal be taken within ten days from the docketing of the district court's order. Absent an appeal within this time, or an extension from the district court for filing the notice of appeal, this court, being without authority to extend the time for filing a notice of appeal, will lack the jurisdiction to hear the appeal.

Id. at 1240.

MHSAA did not file an amended Notice of Appeal following the district court's rejection of the initial Compliance Plan. We therefore conclude that this court lacks jurisdiction to consider MHSAA's argument concerning the rejection.

D. Judge Enslen's refusal to recuse himself

The final issue raised by MHSAA relates to the involvement of the district judge in the present case, Judge Enslen, in a case filed by MHSAA over twenty years ago. In 1983, MHSAA filed suit in the Western District of Michigan against the United States Department of Education and the Office of Civil Rights in the case of

Michigan High School Athletic Association v. Bell, No. 83-CV-6250-AA. Judge Enslen recused himself from the 1983 case for reasons that no one, including Judge Enslen, can presently recall. MHSAA nevertheless argues that because Judge Enslen recused himself then, he should have recused himself now.

The record before us does not explain why Judge Enslen recused himself from the 1983 case, but, in denying MHSAA's motion for disqualification, Judge Enslen stated that he could think of no reason why he would be unable to remain impartial. Judge Enslen also noted that "only one of the 21 Defendants in the current case was a party to the 1983 case, and none of the class Plaintiffs in the current case was involved in the 1983 case." Because MHSAA failed to provide any valid basis for Judge Enslen's recusal, we affirm the ruling of the district court in denying MHSAA's motion. *See Person v. General Motors Corp.*, 730 F.Supp. 516, 518-19 (W.D.N.Y.1990) (stating that recusal in a prior case involving a party is not alone sufficient for disqualification in a later case involving that same party).

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM the judgment of the district court on the basis that MHSAA's actions regarding the scheduling of girls' sports seasons in Michigan violated the Equal Protection Clause of the Fourteenth Amendment.

UNITED STATES DISTRICT COURT,
W.D. MICHIGAN,
SOUTHERN DIVISION.

COMMUNITIES FOR EQUITY, et al., Plaintiffs,

v.

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, Defendant

No. 1:98CV479.

Dec. 17, 2001.
As Corrected Dec. 21, 2001.

OPINION

ENSLEN, District Judge.

"Change is the only constant. Hanging on is the only sin." -Denise McCluggage, U.S. race car driver, as quoted in *WomenSports* magazine, June 1977, at 18.

After a three and one-half year legal struggle, this case is finally ready for resolution. It began on June 26, 1998, when Plaintiffs, an organization named Communities for Equity and two mothers of female student-athletes suing on behalf of their minor daughters, filed a class action lawsuit alleging that the Michigan High School Athletic Association (MHSAA), MHSAA's executive director, and members of the MHSAA Representative Council[1] discriminated against female athletes.

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[1] MHSAA's executive director and members of the Representative Council have been referred to throughout the litigation as the "Individual Defendants." Plaintiffs' claims remain against only Defendant MHSAA.

Plaintiffs alleged that the discrimination against high school female athletes took a variety of forms, specifically naming seven areas of discrimination against female athletes. Once this case wound its way to bench trial before the Court, only one area of alleged discrimination remained for the Court's decision. The sole remaining area of alleged discrimination is the allegation that Defendant MHSAA schedules athletic seasons and tournaments for six girls' sports during less advantageous times of the academic year than boys' athletic seasons and tournaments, and that this scheduling of girls' athletic seasons constitutes legally inequitable treatment.

The scheduling of the girls' sports at issue involves volleyball in the winter, basketball in the fall, soccer in the spring, Lower Peninsula golf in the spring, Lower Peninsula swimming and diving in the fall, and tennis in the fall.[2] Specifically, Plaintiffs claim that all of these girls' sports, with the exception of girls' golf, are played in a non-traditional season, i.e., a season of the year different from when the sport is typically played, and that the non-traditional season is a disadvantageous time of the year to play the sport, causing inequities for girls. Lower Peninsula girls' golf is played in golf's traditional season of spring, but Plaintiffs claim that in the case of golf in Michigan, the non-traditional season of fall is far superior to the spring season, and fall is when Lower Peninsula Michigan boys play golf.

Plaintiffs' federal claims arise under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, pursuant to 42 U.S.C. § 1983 ; and Title IX of the Education Amendments of 1972, 20

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and not the Individual Defendants, who were dismissed from the lawsuit on a motion made pursuant to Fed.R.Civ.P. 52(c). (10/2/01 Order, Dkt. No. 507.)

[2] In the Upper Peninsula of Michigan, boys' and girls' golf are both played in the spring, and boys' and girls' swimming and diving are both held in the winter, so only the Lower Peninsula scheduling of these two sports is at issue in this lawsuit.

U.S.C. §§ 1681 *et seq.*, (Title IX). Plaintiffs' state law claim arises under Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws §§ 37.2101 *et. seq*, specifically those sections barring discrimination in schools and in public accommodations and services. The Court has jurisdiction over Plaintiffs' state law claim through its supplemental jurisdiction.

Plaintiffs seek declaratory and injunctive relief and attorneys' fees. In terms of injunctive relief, Plaintiffs ask that the District Court require that male and female teams of the same sport be scheduled to play in the same season and that girls' volleyball be scheduled to play in the fall. In the alternative, if the Court finds adequate justification for scheduling female and male seasons differently, Plaintiffs ask this Court to require Defendant MHSAA to schedule the same number of male and female sports in non-traditional seasons, "so as to allocate the benefits and burdens of playing in different seasons equally between females and males."

Defendant MHSAA argues that its placement of the girls' sports seasons at issue is advantageous for female athletes and thus not discriminatory. The MHSAA also asserts that legitimate reasons exist for scheduling some male and female teams of the same sports in different seasons, reasons which mostly encompass asserted logistical difficulties in putting more students in one season.

The United States was granted *amicus curiae* status to brief the Court and participate in the trial on the issues of federal law presented. (9/7/00 Order, Dkt. No. 255.) The United States argues in favor of Plaintiffs' position in this matter.

A bench trial over eight days was held to allow the Court to hear from witnesses and to receive documentary exhibits in order to determine what the facts are and what legal conclusions are to be drawn from those facts. During this time, the Court heard from twenty-five witnesses and received 103 exhibits.

Federal Rule of Civil Procedure 52 requires that in cases tried without a jury, the Court shall make findings of fact separately from its conclusions of law. Fed.R.Civ.P. 52(a). Findings of fact shall not be set aside unless clearly erroneous. *Id.*

Much has been said in this case about what a "traditional" season is and what a "non-traditional" season is. For most sports, it is common knowledge when tradition dictates that a sport will be played. Ask almost any woman or man on the street when organized football, on any level, is played, and that person is sure to know that football is a fall sport.

In this case, the Court cares about traditional sports seasons only to the extent that a traditional season, or the season when the sport is usually played at most levels, happens to be the most advantageous playing season for the high school sports at issue in this case. So if girls play sports in non-traditional seasons when boys play in traditional seasons, that does not necessarily break the law, if girls and boys are equally advantaged by the season in which they play a sport.

But a tradition does not become a tradition simply because of random coincidence. A particular playing season often becomes the traditional season for a particular sport in the first place because certain advantages accrue to playing a sport in a certain season. For example, there is a reason why outdoor organized sports like soccer, tennis and football are not played in the winter in Michigan. Similarly, there are other reasons, perhaps less obvious to the casual observer than Michigan weather, why certain sports are not generally played in certain seasons.

The question for this Court is not whether the process through which the MHSAA came to the decisions that it has to schedule girls' sports where it does was fair. The question for this Court is also not whether this Court believes that the scheduling decisions of the MHSAA were wise. The question for this Court is whether the scheduling

decisions made by the MHSAA are legally permissible, and the Court has come to the conclusion that they are not. The MHSAA's seasons decisions are not permitted under the Fourteenth Amendment to the United States Constitution, Title IX, or Michigan's Elliott-Larsen Civil Rights Act.

The Court finds in favor of Plaintiffs and will order appropriate remedies as described herein.

FINDINGS OF FACT

I. THE PARTIES

A. Plaintiffs, Diane Madsen, Jay Roberts-Eveland, and Communities for Equity

Plaintiff Diane Madsen is a teacher for Kentwood Public Schools in the Grand Rapids area. (Trial Transcript[3] (Tr.) at 14:12-19, Diane Madsen Testimony.) Ms. Madsen filed suit on behalf of her three daughters, Katie, Kristi and Kelsey Madsen, who were all minors at the time the suit was filed. (*Id.* at 14:24-15:6; Stipulated (Stip.) Fact No. 28.) The Madsen daughters have participated in or are currently participating in high school sports at Grand Rapids Northview High School, a MHSAA member school. (Stip. Fact No. 15.) Katie, currently attending Aquinas College in Grand Rapids, played basketball and volleyball; Kristi, currently attending Cornerstone University, also in Grand Rapids, played softball, basketball, volleyball, tennis and was a member of the swim and dive team; and Kelsey, currently a junior at Northview High School, plays basketball and volleyball. (Tr. at 15:7-16:2, D. Madsen; Tr. at 90:15-22, Kristi Madsen.)

Ms. Madsen is also president of Plaintiff Communities for Equity (CFE). (Tr. at 23:22-24:12, D. Madsen.) Ms. Madsen testified that she viewed a number of areas in her children's school's girls' sports programs as highly

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[3] Citations are to the transcript prepared daily by the Court's Official Court Reporter Kathleen S. Thomas for the parties during trial.

inequitable, compared to boys' sports programs, and she subsequently became interested in changing the situation. (*See, e.g., id.* at 16:7-19:7.) Ms. Madsen and other parents with similar concerns at other schools began to meet to discuss the issue, and CFE was formed. (*Id.* at 23:6-21.)

CFE was founded by parents and student-athletes in 1997 "to educate people about the compliance of Title IX, about gender equity in general in athletics, and to advocate for the compliance of Title IX." (Tr. at 23:3-28:25, D. Madsen.) CFE works toward this goal by distributing a "parental tool kit" for parents and students to learn about Title IX, and by speaking to groups throughout Michigan. (*Id.* at 25:14-20, 26:14-27:2; Trial Exhibit (Tr. Exh.) 51 (CFE Tool Kit: "A Parental Guide to Title IX and Gender Equity in High School Athletics").) In addition, CFE advocates its position with various parties, including the MHSAA, to whom CFE complained about the current scheduling of seasons for girls, including sending CFE's position papers and examples of harms that CFE feels result for girls under the status quo. (*See* Tr. Exhs. 57-59.)

Plaintiff Jay-Roberts Eveland has filed suit on behalf of her daughters, Kele and Breanna, who were both minors at the time this lawsuit was filed. (Tr. at 372:19-22, Kele Eveland Testimony; Tr. at 633:14-17, Breanna Eveland Testimony; Stip. Fact No. 30.) Ms. Eveland is also vice-president of CFE. (Tr. at 24:9-15, D. Madsen.) The Eveland daughters have participated or currently participate in high school sports at East Kentwood High School, a MHSAA member school. (Stip. Fact No. 15.) Kele, currently attending Georgia Tech University on an athletic scholarship for volleyball, played volleyball and basketball in high school. (Tr. at 374:17-21, K. Eveland.) Breanna, currently a senior at East Kentwood High School, plays basketball and volleyball and runs track. (Tr. at 634:15-23, B. Eveland.)

This lawsuit has been certified as a class action. Madsen, Eveland, and CFE represent a class of all present and

future female students enrolled in MHSAA member schools participating in interscholastic athletics or deterred from participating because of Defendant MHSAA's allegedly discriminatory conduct, and who are adversely affected by that conduct. *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 192 F.R.D. 568, 570 (W.D.Mich.1999).

B. Defendant Michigan High School Athletic Association

Defendant Michigan High School Athletic Association (MHSAA) acts as the governing body for interscholastic sports in the State of Michigan. The MHSAA is an incorporated membership organization. (Tr. Exh. 28 (MHSAA Articles of Incorporation).) Its Articles of Incorporation describe the MHSAA's purpose as follows:

> To create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state consistent with the educational values of the high school curriculums, the interest in physical welfare and fitness of the students participating therein by giving the opportunity to participate in athletics designed to meet the needs and abilities of all and to make and adopt such rules and regulations and interpretation thereof to carry out the foregoing and to further provide for the training and registering of officials and to publish and distribute such information consistent therewith and to do any and all acts and services necessary to carry out the intent hereof.

(Tr. Exh. 28; Stip. Fact 1.)

The MHSAA membership is comprised of over 700 Michigan high schools, over 80 percent of which are public. (Tr. Exh. 9(a) at 13 (2000-01 MHSAA Handbook); MHSAA's Answers to Plaintiffs' First Request for Admissions, Response No. 5 (served 7/28/99).) Put another way, all of Michigan's public high schools with qualifying interscholastic athletic programs, with the exception of

some charter schools, are MHSAA members. (*Compare* Tr. Exh. 12 (1999-00 MHSAA Member School Directory) *with* Tr. Exh. 26 (Michigan Department of Education's list of public high schools).) Nearly all of MHSAA's member schools are recipients of Federal financial assistance. (*Compare* Tr. Exh. 12 *with* Tr. Exh. 25 (Michigan Public School District Directory).)

The MHSAA was founded in 1924 "to exercise control over the interscholastic athletic activities of all schools of the state through agreement with the Superintendent of Public Instruction." (Tr. Exh. 116 at 3 (1978-79 MHSAA Handbook Foreword).) Historically, the interscholastic athletic programs of all Michigan public schools were supervised and controlled by either the Michigan Superintendent for Public Instruction or by the State Board of Education. *See* School Code of 1955, 1955 P.A. 269, § 784; Mich. Comp. Laws § 388.1014 (2001). The MHSAA was housed within the Michigan Department of Education, and its Executive Director was known as the "State Director of Athletics." (Tr. Exhs.115, 117.) The MHSAA's handbook, rules, and regulations were part of the Administrative Code of the State of Michigan. (Tr. Exh. 118.)

In 1972, the Michigan Legislature amended the School Code to move the authority for interscholastic athletics from the State Board of Education to the boards of individual school districts, permitting the districts to join the MHSAA as long as a representative of the State was a member of the MHSAA's governing body. 1972 P.A. 2, § 379 (repealed 1976); Mich. Comp. Laws § 380.1289 (1976) (amended 1995). Also, the Michigan Legislature designated the MHSAA as the "official association of the state for the purpose of organizing and conducting athletic events, contests, and tournaments among schools and [decreed that it] shall be responsible for the adoption and enforcement of rules relating to eligibility of athletes in schools for participation in interschool athletic events, contests and tournaments." *Id.*

The MHSAA incorporated itself in 1972 "to create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state consistent with educational values of the high school curriculum." (Tr. Exh. 28 at 2 (Articles of Incorporation); Stip. Fact No. 1.) Membership in the MHSAA is open to all secondary schools in Michigan. (Tr. Exh. 9(a) at 15 (2000-01 MHSAA Handbook, Constitution, art. II, § 1).) To join the MHSAA, a school's board of education must agree to adopt MHSAA rules and regulations "as its own and agree[] to primary enforcement of such rules as to its own schools." (*Id.* at 15 (Constitution, art. II, § 2).) Membership may be denied or delayed to schools who engage in "practices and behaviors ... that are in opposition to [MHSAA's] regulations and principles for interscholastic athletics." (*Id.* at 14 ("How to Join the MHSAA").)

In 1995, the Michigan Legislature amended the School Code again, removing the MHSAA's official designation, but confirming that school districts were still authorized to "join organizations [such as the MHSAA] as part of performing the functions of the school district." Mich. Comp. Laws § 380.11a(4) (2001). The 1995 amendment resulted in no substantive changes in the structure or operation of the MHSAA or in its relationships with its member schools.

The MHSAA regulates interscholastic athletic competition between member schools and sets standards for school membership and eligibility of students to participate in interscholastic athletics. For example, the MHSAA has adopted playing rules and regulations for each MHSAA-sanctioned sport. (Tr. Exh. 9(a) at 50 (Regulation II, § 8).) These regulations "apply in sub-varsity, as well as varsity, interscholastic scrimmage as well as games, and regular season as well as MHSAA tournaments." (*Id.* at 26; Tr. Exh. 14 at 7 (1999-00 MHSAA Coaches Guidebook, p. 5) ("Schools shall adhere to the playing rules adopted by the MHSAA to govern games and meets in baseball, basketball, competitive cheer, cross country, football, golf, gymnastics,

ice hockey, soccer, softball, skiing, swimming and diving, tennis, track and field, volleyball and wrestling.").) Further, the MHSAA must approve any meet or tournament held in Michigan involving three or more teams sponsored by a nonmember school, and if such an event is approved, it must be conducted pursuant to MHSAA rules. (Tr. Exh. 9(a) at 47-48 (Regulation II, § 5(A) and Interpretation No. 157).)

MHSAA rules state that any person coaching an interscholastic team "SHOULD be a member of the regular teaching staff or the school district." (Tr. Exh. 9(a) at 46 (Regulation II, § 3) (capitalization in original).) Non-faculty member coaches must register with the MHSAA prior to assuming any coaching duties. (*Id.*; Tr. Exh. 21(f) (MHSAA Non-Faculty Coach Registration Form).)

In all MHSAA-sanctioned sports except tennis and golf, the MHSAA requires its member schools to use only MHSAA-registered game officials to officiate athletic contests in which teams from those schools participate. (Tr. Exh. 9(a) at 49 (Regulation II, § 7).) To register as an official, a person must complete an application form indicating which sports he or she will officiate, pass a written examination on MHSAA rules and regulations, and pay a registration fee to the MHSAA. (Tr. Exh. 20(a) (MHSAA memorandum to "Prospective MHSAA Officials"); Tr. Exh. 20(b) (MHSAA Officials Registration Application).)

The MHSAA limits participation in interscholastic athletics to "eligible" students. (Tr. Exh. 9(a) at 46 (Regulation II, § 1).) To be eligible to play, a student must, among other things, be younger than age 19, have passed at least four full credit courses during the previous semester, be currently passing four full credit courses, and have passed a physical examination. (*See id.* at 27-45 (Regulation I—"Essential Eligibility Requirements for Senior High School Students"); Tr. Exh. 18 (MHSAA pamphlet summarizing eligibility rules).)

Member schools who violate any of the MHSAA's rules are subject to a wide range of penalties, including censure,

probation, bans from regular season competition and MHSAA tournaments, forfeiture, and expulsion. (Tr. Exh. 9(a) at 78 (Regulation V, § 4).) MHSAA has adopted a "due process procedure" for investigating alleged violations and assessing penalties, which includes adequate notice to the party being investigated, written findings, and the right of appeal. (*Id.* at 21-23 (Due Process Procedure).) MHSAA actively enforces its rules and regulations. (MHSAA's Answers to Plaintiffs' Second Request for Admissions, Response No. 37 (served 7/29/99).)

"[G]eneral control of interscholastic athletic policies" is vested in the Representative Council, according to the MHSAA's Constitution. (Tr. Exh. 9(a) at 18 (Constitution, art. VI, § 1).) The Council is composed of nineteen voting members, of which fourteen individuals are elected by member schools, four individuals are appointed by the Representative Council, and one is a representative of the state superintendent of education. (*Id.* at 15 (Constitution, art. IV, § 1).) Except for the state representative, membership in the Representative Council is limited to faculty and board of education members of each member school. (Tr. Exh. 9(a) at 16.) Council members must resign their positions if they end their position at member schools. (Tr. Exh. 9(a) at 13, 15-17.)

The fourteen elected members of the Representative Council are elected by vote of the member schools. (Tr. Exh. 9(a) at 13.) In 2000-01, seventeen of the nineteen members of the MHSAA Representative Council were employees or representatives of public schools or school districts. (*See* Tr. Exh. 9(a) at 6-7 *compared with* Tr. Exh. 25 (Michigan Public School District Directory).)

The MHSAA has an Executive Committee, comprised of five Representative Council members, three elected officers and two members appointed by the president. (Stip. Fact 6.) One of the Executive Committee's powers is to "[m]ake all rules necessary for the effective control and government of interschool activities consonant with the legislation

enacted by the Representative Council and with this Constitution ...." (Tr. Exh. 9(a) at 18.)

The Executive Director of the MHSAA is "the executive officer in control of Senior High School and Junior High/Middle School interscholastic athletics." (Tr. Exh. 9(a) at 19.) The Executive Director is also responsible for investigating, deciding, and penalizing violations of the MHSAA's rules and regulations. (*Id.*) Decisions of the Executive Director are "subject to review by the Executive Committee and/or the Representative Council, upon appeal by the Administration of the Member School or Schools involved." (*Id.*)

Most of the MHSAA's revenue is derived from state championship tournaments. Approximately 86 percent of the MHSAA's budget comes from the sale of tickets to its tournament events. (Tr. Exh. 16 at 2 (Flyer-"This is the MHSAA").) Member schools remit a substantial portion of the gate receipts from their participation in the state championship tournaments to the MHSAA. (*See* Tr. Exhs. 37(a)-(h) (MHSAA Financial Report Forms from MHSAA Tournaments).) For example, in 1997, Rockford High School hosted a regional football playoff which grossed $14,948 in admissions; $12,208 (82 percent) was remitted to the MHSAA. (Tr. Exh. 37(a).) The remainder of the MHSAA's revenue comes from tournament concessions, fees for the registration of officials, advertising in tournament programs, corporate sponsorship, and royalties from radio and television broadcasts of MHSAA tournament events. (Tr. Exhs.35-37.)

The MHSAA issues broadcast policies on radio and television coverage for both regular season and post-season tournaments. "The Representative Council ... passed a regulation effective August 1, 1989, prohibiting live television originations of regular-season athletic events involving member schools." (Tr. Exh. 21(a) at 3.) MHSAA rules also state that "[n]o school may televise live—or may grant on a complimentary or fee basis to either a profit or

nonprofit entity the rights to televise live on commercial, subscription or independent stations or networks—any interscholastic event in which any MHSAA member school is a participant in any MHSAA Tournament sport." (Tr. Exh. 9(a) at 59 (Regulation II, Section 14(B)).) Schools participating in broadcast events do not receive any portion of the broadcast royalties. (Tr. Ex. 20(a)). Finally, member schools host many of the tournament games and provide employees to manage those game sites. (*See* MHSAA's Answers to Plaintiffs' First Request for Admissions, Response No. 7 (served July 28, 1999).)

Until January 1, 1988, MHSAA employees with state teaching certificates were considered state employees eligible to participate in the state retirement system. Mich. Comp. Laws § 38.1347(1) (1987). Employees who began with the MHSAA before that date still have membership in the state employees' retirement system. Mich. Comp. Laws § 38.1347(1)-(2) (2001).

The Representative Council appoints committees which make recommendations to the Council on seasons and other issues, recommendations which are rejected or approved by the Council. (*Id.* at 944:13-945:1.) Further, as a condition of membership, schools are obligated to follow all of the MHSAA rules; put simply, "it's a take it or leave it proposition." (Tr. at 867:11-15, K. McGee.)

Many member schools belong to leagues or conferences which also regulate interscholastic athletics to some degree. (Tr. at 785:16-788:5, K. McGee.) But all conference rules must comply with MHSAA rules, since the schools are also MHSAA members. (*Id.* at 863:14-864:1; Tr. at 164:4-10, L. Kostreva; Tr. Exh. 222, at 2, 6-9.) The Big Nine Athletic Conference Constitution, for example, prescribes that "failure to join MHSAA will result in automatic exclusion from membership in the league." (Tr. Exh. 222 at 6 (Big Nine Athletic Conference Constitution).)

The MHSAA determines when seasons occur. The MHSAA prescribes when practice may begin, when

competition may begin, when competition must end, and the maximum number of games that may be played. (Tr. Exh. 9(a) at 54-55 (Regulation II, § 11(A)).) Member schools are prohibited from practicing outside of the dates set by the MHSAA calendar. (Tr. Exh. 9(a), at 54-61, 109-110; Tr. Exhs. 63, 83.) Member schools may not participate in any competition beyond the end of the MHSAA season or state championship tournament in any sport. (*Id.* at 59 (Regulation II, § 12).) For example, for the 2000-01 school year, the MHSAA prohibited girls' basketball teams from practicing before the week of August 15, limited teams to 20 games and four scrimmages for the season, and required teams "to terminate practice and competition on or before the final date of the MHSAA sponsored ... tournament." (Tr. Exh. 9(a) at 54-55 (Regulation II, §§ 11(A), 11(B), and 12).)

Schools, with the assistance of conferences and leagues if they are a part of one, set only the practice schedule and game dates within a season. In addition, MHSAA rules prohibit member school athletes from participating in both interscholastic sports and amateur club sports in the same sport in the same season. (Tr. Exh. 14, at 4; Tr. Exh. 9(a) at 43-44.)

The MHSAA also limits the scope of permissible activities "outside of the MHSAA-defined season for a sport." (Tr. Exh. 9(a) at 55 (Regulation II, § 11(G)).) Sports activities during that time cannot use school transportation, school uniforms, or school district funds; hold mandatory practices or games; or involve more than three players from the same school team if the coach is also present. (*Id.*)

The MHSAA sponsors state championship tournaments in twelve boys' sports and twelve girls' sports. (Tr. Exh. 16 at 3 (Flyer—"This is the MHSAA").) These state-wide tournaments are open only to MHSAA member schools who comply with MHSAA's rules and regulations. (Stip. Fact No. 14; MHSAA's Answers to Plaintiffs' First Request for Admissions, Response No. 12 (served July 28, 1999); Tr.

Exh. 9(a) at 76 (Regulation V).) "[O]nly those teams playing a sport during a current season will be eligible to enter the MHSAA meet or tournament in that sport. For example: Girls golf teams playing in the fall season will not be eligible to enter the Girls Regional Golf Tournament in the spring." (Tr. Exh. 9(a) at 60 (Regulation II, § 15, Interpretation No. 214).)

The very nature of interscholastic athletics necessitates a controlling entity like the MHSAA. (Tr. Exhs.22, 115.) The structure provided by the MHSAA as Michigan's governing body is necessary for appropriate organization of interscholastic athletics. "[I]t would be chaos" with "a system of high school sports where there is not a level playing field ... by when [schools] compete against each other." (Tr. at 869:8-14, Kathleen McGee Testimony; Tr. Exh. 22 at 3 (MHSAA document explaining that in contrast to non-athletic activities such as music and drama, central control and a "statewide regulatory body" is necessary to the success of interscholastic athletics).) Indeed, 90 percent of high schools in the state of Michigan and 60 percent of the junior high/middle schools are members of MHSAA. (Tr. Exh. 16 at 2.)

II. THE SCHEDULING HISTORY OF GIRLS' SPORTS

John Roberts, the MHSAA's current executive director, has written, "Boys' sports were in [MHSAA member] schools first and girls' sports, which came later, were fitted around the pre-existing boys program. While this allowed for the best use of facilities, faculty and officials, it also led to an imbalance of girls' athletic opportunities across the three seasons of the school year." (Tr. Exh. 81 at 1 (John Roberts, "Sports and Their Seasons," 1990-91 MHSAA Bulletin).)

Until the early 1970s, before it was an MHSAA-sanctioned sport, girls played high school basketball in the winter at the same time boys' teams played. (Tr. at 576:1-

15, 577:20-25, Catherine Dritsas[4] Testimony.) In December 1970, the MHSAA received requests from certain schools for permission to start girls' basketball practice "before the established winter starting dates," to run girls' basketball in fall. (Tr. Exh. 33 at 2 ("Girls Basketball in Michigan," Sept. 1983 MHSAA Bulletin).) The reasons given for the request included "better use of the physical plants." (*Id.*; Tr. at 578:1-8, C. Dritsas.) After a hearing held on October 11, 1971 to discuss the topic, it was recommended that a rule permitting competition in girls' basketball at any time during the school year be adopted. (Tr. Exh. 33 at 2.) There is no indication whether this rule was adopted. (*See id.*) Presumably the rule was adopted, however, since an unknown number of girls' teams may have also been playing in the fall at some point before the MHSAA sponsored a tournament for girls' basketball. (*Cf.* Tr. at 772:6-10, K. McGee.)

The MHSAA held the first MHSAA girls' basketball tournament in fall 1973. (Tr. Exh. 27 at 6 (1972-73 MHSAA Bulletin, vol. XLLX [sic], at 422).) Surveys were submitted to schools to determine when they wanted the tournament held. (Tr. Exh. 33 at 2.) In 1976, the MHSAA's Girls' Basketball Committee recommended that the "Girls Basketball season move to the Winter and Girls Volleyball be played in the fall." (Tr. Exh. 78 at 1 (Minutes of 5/22/76 Girls Basketball Committee Meeting).)

The following year, the MHSAA merged the Girls' Basketball Committee into a single committee of boys' and girls' basketball coaches. (Tr. Exh. 78 at 3 (Minutes of 5/5/77 Basketball Coaches Committee Meeting).) By a vote of 11-2, the newly-constituted Basketball Coaches Committee voted

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[4] Ms. Dritsas coached girls' basketball at the Academy of Sacred Heart in the Detroit area from 1969 to 1997. (Tr. at 575:1-5, C. Dritsas.) She was inducted into the Michigan High School Coaches Hall of Fame in 1993. (*Id.* at 575:13-17.) She was called to testify by the United States.

to keep boys' basketball in the winter and girls' basketball in the fall. (*Id.*)

Some schools attempted to continue playing girls' basketball in the winter. (Tr. at 580:5-14, C. Dritsas.) Within a couple of years, however, these schools had to move girls' basketball to the fall because they "didn't have anybody to compete against and the girls were denied the opportunity of any state tournament competition." (*Id.*)

The MHSAA noted in 1983, in "Girls Basketball in Michigan," that "[i]t is alleged that girls and boys are not treated equally because of the split seasons; but it is quite obvious, based on the surveys, that school administrators believe a split season in boys and girls basketball is the very best way to meet the needs of interscholastic athletic competition for both boys and girls." (Tr. Exh. 33 at 2.)

Prior to 1971-72, the MHSAA scheduled boys' golf in the spring. The MHSAA moved the boys' season to the fall to obtain "the use of better courses on Saturdays." (Tr. Exh. 29 at 2 (1973-74 MHSAA Bulletin, vol. L, p. 5)). In 1976, the Representative Council decided to conduct the girls' tournament on Mondays instead of Saturdays "since Saturdays are days in which it is extremely difficult to acquire courses for participation." (Tr. Exh. 10(b) at 3 (1976 MHSAA Bulletin, at 6).) The following year, the Sports Season Committee reconsidered recommending to the Representative Council that it switch girls' golf from the spring to the fall, but the vote was defeated within the committee by a narrow margin. (Tr. Exh. 87 (5/4/77 Sports Season Committee Meeting Minutes at 16).)

In 1981, the Representative Council decided to schedule boys' and girls' soccer together in the fall, "based on the survey of schools, as well as the financial advantage to schools in conducting the sport during the same season for boys and girls." (Tr. Exh. 47 at 3 (Minutes of 12/9/81 Representative Council Meeting at 393).) In fact, sixty member schools voted for separate seasons for the sexes in soccer, but eighteen schools voted for a combined season.

(Tr. Exh. 229 (1981 Survey—Soccer).) However, most schools (507) expressed no preference, and many apparently did not vote. (*Id.*) After being asked by several school administrators to reconsider its decision, the Representative Council "determined that, beginning with the 1982-83 school year, a Boys Soccer Tournament would be scheduled in the fall and a Girls Soccer Tournament would be scheduled for the spring." (Tr. Exh. 10(d) at 5 (Minutes of 3/28/82 Representative Council Meeting).)

In May 1990, the MHSAA recognized that girls' participation opportunities in the winter season were lacking. "[G]irls' athletic opportunities in the winter are in almost every Michigan high school, inadequate compared to boys' opportunities in the winter and girls' opportunities in the fall and spring." (Tr. Exh. 81 at 1 (John Roberts, "Sports and Their Seasons," 1990-91 MHSAA Bulletin).) Consequently, the MHSAA took the "first step" to remedy this inequity "by changing Lower Peninsula girls swimming and diving from the fall season to the winter." (*Id.*) Thirteen years earlier, in 1977, the MHSAA's Sports Season Committee had recommended to the Representative Council that it "change the girls swimming season to coincide with the boys season in the winter." (Tr. Exh. 87 at 1 (5/4/77 Sports Season Committee Minutes).)

In November 1990, the MHSAA reversed the decision to move girls' swimming and diving to the winter and decided to study, among other things, "the most opportune placement of the girls and boys swimming seasons in the Lower Peninsula" and "the most opportune placement of other sports currently regulated by MHSAA (volleyball, basketball and golf for girls and soccer for boys are frequently discussed)." (Tr. Exh. 81 at 1 (John Roberts, "Sports and Their Seasons," 1990-91 MHSAA Bulletin).) This reversal was due to opposition, at least in part, by fifty schools and the Michigan Interscholastic Swim Coaches Association (MISCA). (Tr. Exh. 45 at 236; Tr. at 1196:2-24, Greg Phill Testimony.)

Following its reversal, the Representative Council "reaffirmed the need to continue discussing sports seasons." (Tr. Exh. 95 at 9-11 (4/23/91 Memorandum Regarding "Pro-Active Approach to Expanding Athletic Opportunities for Girls in the Winter Season").) This discussion led to a proposal that the MHSAA move "slowly and deliberately to examine the placement of several existing programs" while at the same time considering whether to sponsor new winter activities for girls. (*Id.*)

The MHSAA was aware that it could be held legally liable if girls' sports seasons were found legally inequitable. The proposal to study seasons was "made mostly to do what is needed for girls, but also in part to keep the MHSAA in a position of choosing its future voluntarily rather than being forced to fight legislated or court-ordered changes in the future if something is not done soon." (Tr. Exh. 95 at 9.)

Of the three winter activities that it considered, bowling, indoor track and competitive cheerleading, MHSAA decided to adopt cheerleading for girls in 1994. (Tr. Exh. 95 at 10; Tr. Exh. 9(a) at 26; Tr. Exh. 98.)[5] With respect to moving existing seasons, the Representative Council was informed by the author of an MHSAA document that "it is important for the long term that the MHSAA conduct without fanfare a comprehensive study of sports seasons," including (1) "switching girls and boys Lower Peninsula swimming seasons by the year 2000;" (2) "combining boys and girls golf into a single coed program by the year 2000 (and possibly doing the same for tennis);" and (3) "switching girls

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[5] John Roberts, MHSAA Executive Director, said in his column "Sports and Their Seasons" in a 1990-91 MHSAA Bulletin, "No one sport can solve all the historical inequities, and no sport can be above consideration as a part of the future solution. Cheerleading cannot be considered in the solution. While cheerleading is certainly a part of the total experience available to boys and girls in the winter, merely defining cheerleading as a sport and counting it toward athletic opportunities for girls in the winter does not satisfy Federal regulations when analyzing opportunities for boys vs. girls in interscholastic sports." (Tr. Exh. 81.)

volleyball and basketball seasons by the year 2000." (Tr. Exh. 95 at 11.)

That memo, of April 23, 1991, also "proposed that the Representative Council give the directive to the MHSAA staff in May *to work quietly but steadily through the state's athletic and educational communities for however long is necessary to find and/or forge consensus regarding these and other ideas.*" (*Id.* (unclear whether emphasis in original).) There is no evidence that the MHSAA studied the sports season issue as recommended, and MHSAA has implemented none of the proposed changes detailed above.

Finally, the MHSAA does not currently sponsor boys' volleyball. But the MHSAA's executive staff and volleyball committee have recommended that once the sport is adopted, it be played in the spring when the NCAA schedules men's volleyball. (Tr. Exh. 79 at 2 (Excerpts from Spring 1997 MHSAA Representative Council Meeting Agenda).)

III. SPORT-SPECIFIC FACTS

A. Girls' Basketball

The Court determines that there are a number of specific disadvantages to playing basketball in the fall. After hearing the evidence, the only potential advantage is the possibility that the opportunity for recruitment to play collegiate basketball may be increased because college women's coaches may be able to see teams that play in the fall more often and with fewer NCAA recruiting restrictions. However, the MHSAA did not offer any evidence to prove that this translated into more scholarships or spots on collegiate basketball teams than Michigan girls would otherwise receive.

Regardless, moving girls' basketball to the traditional winter season would still give girls exactly equal opportunity to be recruited for collegiate play as boys' basketball players. Moreover, there is only circumstantial evidence that Michigan girls playing in the winter would not

be recruited at the same level that the MHSAA asserts that they are in fall. Finally, the Court finds that girls were originally scheduled to play basketball in the fall to avoid inconveniencing the boys' basketball team, and that kind of historical stigma should be erased.

1. General Disadvantages to Playing in Fall

In 1999-2000, 19,760 girls played basketball for MHSAA member schools. (Tr. Exh. 99 at 42-43.) The MHSAA schedules the girls' basketball state championship tournament in the fall. (Stip. Fact No. 41.) For 2001-02, the MHSAA set the first practice date for August 13, the first contest date for August 27, and the end of the season as December 1. (Tr. Exh. 9(a) at 113.) This places the girls' basketball season in the fall. Forty-eight states schedule girls' basketball in the winter. (Tr. Exh. 256.)[6] The National Collegiate Athletic Association (NCAA) also schedules college women's basketball in the winter. (Tr. Exh. 40 at 2.)[7]

The MHSAA schedules the boys' basketball state championship tournament in the winter. (Tr. Exh. 9(a) at 113). For 2001-02, the MHSAA set the first practice date

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[6] Until recently, 44 states scheduled girls' volleyball in the fall and girls' basketball in the winter. As a result of litigation, three additional states will also be switching seasons to this format. *Pederson v. South Dakota High Sch. Athletic Ass'n*, No. 00-4113 (D.S.D.) (consent decree); *Alston v. Virginia High Sch. League*, 176 F.R.D. 220 (W.D.Va.1997) (settlement agreement following jury verdict in plaintiffs' favor); *Ries v. Montana High Sch. Ass'n*, Case No. 9904008792, slip op. (Mont. Dep't of Labor & Indus. Aug. 11, 2000). A fourth state, North Dakota, has voluntarily agreed to switch the seasons. Jane Bos, *Michigan Soon Will Stand Alone; Four States Moving Girls Hoops to Winter*, The Grand Rapids Press, Aug. 26, 2001, at D10, *available at* 2001 WL 25385084 (reporting on North Dakota).

[7] As explained earlier, the traditional playing season for a sport is one hallmark that the season is an advantageous time to play the sport, but tradition is not dispositive. In the same manner, the season in which the NCAA sponsors a particular sport is a hallmark of a traditional, and thus advantageous, season, but it is only one, non-dispositive factor.

for boys as November 12, the first contest date for December 3, and the end of the season as March 23. (*Id.*) Winter is the season when high schools in the rest of the country play boys' basketball and when the NCAA schedules men's basketball. (Tr. Exh. 256; Tr. Exh. 40 at 2.) The traditional playing season for basketball is the winter. (Tr. at 497:1-4, D. Lopiano).[8]

Plaintiffs presented very credible evidence that the MHSAA's scheduling of girls' basketball in the fall disadvantages girls in several ways. Because Michigan girls play basketball in the fall season, they cannot participate in special events for professional or semi-professional teams, such as playing before or at half-time of a professional game, that take place during the traditional winter season. (Tr. at 99:8-100:8, Kristi Madsen Testimony.) Michigan's female high school basketball players do not get to participate in "March Madness" or the excitement and publicity surrounding this time period when the rest of the country's high schools and colleges are participating in championship basketball tournaments. (Tr. at 98:1-23, Kristi Madsen[9]; Tr. at 114:20-115:21, Kelsey Madsen.[10])

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[8] Dr. Lopiano is executive director of the Women's Sports Foundation, whose mission is to expand and enhance opportunities for girls and women to participate in sports and leadership opportunities. (*Id.* at 485:1-11.) Dr. Lopiano, who testified as an expert witness for Plaintiffs, has a Ph.D. in athletic administration with a subspecialization in gender equity in sport. (*Id.* at 490:7-10.) She served as director of women's athletics at the University of Texas, and served on the NCAA committee that produced the first gender equity study for the NCAA. (*Id.* at 491:13-492:3.) At MHSAA's invitation, she has also spoken at MHSAA's Women in Sports Leadership Conference. (*Id.* at 492:4-13.) Further, she provided input in the drafting of the U.S. Department of Education's athletics regulations promulgated under Title IX. (*Id.* at 493:24-494:7.)

[9] Kristi Madsen testified for Plaintiffs. (Tr. at 90:1-4, Kristi Madsen.) Among the many sports she played at various points in high school, Ms. Madsen played four years of both volleyball and softball and three years of basketball. (*Id.* at 90:15-91:14.)

[10] Kelsey Madsen, a Northview High School junior, testified for Plaintiffs. She played basketball, volleyball and softball her first two

"March Madness" is the season of the year when basketball is the featured sporting event in the news media because of NCAA tournaments, and a number of promotional events promote basketball and basketball players. Kelsey Madsen testified that "for boys' basketball, it means tournaments and publicity for it and everyone is watching boys' basketball. It's a big hype for the season." (Tr. at 114:23-25, Kelsey Madsen.) High school girls' basketball in Michigan cannot similarly capitalize on the excitement that "March Madness" promotions create in the general public because they are not playing in March. Kelsey Madsen said, "I would love [playing girls' basketball during 'March Madness.'"] It would be awesome, just to know that you're part of something like that, to have an opportunity to play and be known in the season as like 'March Madness.' It's just everyone knows what it is. It would be good." (*Id.* at 115:16-21.) Kristi Madsen said that not being able, as a high school basketball player, to participate in the "March Madness" hype made her feel "[a]ngry. I didn't like it. Again, the guys get a ton of special perks or attention because it's 'March Madness' and because they are playing in March, during 'March Madness.'" (*Id.* at 98:19-23.) Moreover, attention is on the sport of football and the state football tournament in the fall, which is when girls play basketball. (*Id.* at 99:1-7, Kristi Madsen.)

Because Michigan girls do not play basketball in the winter and because Friday nights are dedicated to boys' football in the fall, girls often must play basketball during school nights on Tuesdays and Thursdays. (Tr. at 29:18-32:6, D. Madsen; Tr. at 93:16-94:9, Kristi Madsen (testifying that she and her teammates "had to bring homework to do at the games or on the bus because we had school the next day on both Tuesday and Thursday nights").) On the other hand, Michigan boys are able to play basketball on Tuesday and

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years of high school, and planned to play volleyball and softball her junior year. (Tr. at 111:3-20, Kelsey Madsen.)

Friday nights in the winter. If the girls played basketball during the traditional winter basketball season like the boys, girls would also have the opportunity to play games on Tuesday and Friday nights. (Tr. at 94:2-9, Kristi Madsen; Tr. at 518:1-7, D. Lopiano.)

Moreover, Michigan girls have decreased ability to be nationally ranked or obtain All-American honors because they play basketball during the non-traditional fall season. (Tr. at 501:17-502:2, D. Lopiano.) Dr. Linda Bunker[11] testified that Parade All-American team selections for high school basketball players are made in March. She further testified that "[i]f you play your high school basketball season in the fall, you're not even really eligible to be considered. I mean, you can be legally considered, but everybody's forgotten about you. It's a tremendous disadvantage." (Tr. at 706:1-6, Linda Bunker Testimony.) Not being able to participate in national team rankings and All-American honors "affects [Michigan girls'] visibility to recruiters in terms of college athletic scholarship opportunities." (Tr. at 501:25-502:2, D. Lopiano.) Ms. McGee counters that Michigan girls still can be and are nationally ranked in rankings like the USA Today National Poll and Parade All-American Team. (Tr. at 878:16-21, K. McGee.[12]) The MHSAA did not, however, provide any

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[11] Dr. Linda Bunker has a Ph.D. in kinesiology and sports psychology and is a tenured professor at the University of Virginia. (Tr. at 651:9-10, L. Bunker.) She was an expert witness for Plaintiffs. Dr. Bunker's research and scholarship focuses on the psychological aspects of sport and the way in which sport contributes to the lives of young boys and girls and men and women in contemporary society. (*Id.* at 651:14-18.) Besides being a member of several prominent professional sport psychology associations, Dr. Bunker has also received several distinguished awards. (*Id.* at 662:18-663:5.)

[12] Ms. McGee is athletic director and head girls' basketball coach at Flint Powers Catholic High School. (Tr. at 768:11-14, K. McGee.) She testified on behalf of the MHSAA. She has coached girls' basketball for twenty-nine years and been an athletic administrator for nine years. (*Id.* at 769:2-6.)

evidence that suggested that the ability to be ranked was not influenced by the fall playing season.

Girls also lose opportunities to participate in national shoot-outs such as the Nike and Blue Star shoot-outs. These shoot-outs occur in the fall when girls are participating in their high school basketball seasons. In fall 2001, there were eighteen Blue Star shoot-outs between September 16 and October 21 that Michigan girls could not attend because of the scheduling of their high school seasons in the fall. (Tr. at 911:18-913:5, S. Guevara.)

The boys' high school basketball season is approximately three weeks longer than the girls' season, giving boys a greater opportunity to practice and play. (Tr. at 499:23-500:5, D. Lopiano; Tr. Exh. 63 (1998-99 MHSAA Quick Reference Calendar).) Michigan girls, unlike Michigan boys, cannot compete against teams in neighboring states because girls in those states play basketball in the traditional winter season. (Tr. at 503:10-18, D. Lopiano; Tr. at 175:12-22, L. Kostreva (testifying that Menominee boys play basketball against Wisconsin high schools during the MHSAA regular season).) Playing against teams in neighboring states can also lessen travel burdens. (*See id.* at 171:25-172:8, 175:12-22, 198:7-14 (testifying that Menominee boys need only travel five minutes to play certain Wisconsin schools whereas girls must travel an average of 90 minutes to play other Michigan schools).)

2. Recruiting

The testimony regarding the effect that the placement of the girls' basketball season in the fall has on college athletic recruitment opportunities conflicted. The MHSAA argued that Michigan girls have special advantages in being recruited to play on collegiate teams by playing high school basketball in the fall, which are discussed *infra*. Even if this were true, however, it is undisputed that if Michigan girls played basketball during the winter season, they would, at the very least, be on "equal footing" with Michigan boys and with girls in the rest of the country with respect to

collegiate recruiting. (Tr. at 851:21-852:4, K. McGee; Tr. at 910:12-16, Sue Guevara Testimony).

Ms. McGee testified that "it's very easy to get [the] kids [she coaches] evaluated in the fall." (Tr. at 795:9-14, K. McGee.) While the Court places a good deal of weight on Ms. McGee's impression given her experience in coaching girls' basketball, her testimony must also be considered in light of Flint Powers' status as "one of the most successful" girls' basketball teams in Michigan whose "experiences [might be] different from the run-of-the-mill programs in the state." (*Id.* at 825:14-23.)

Another MHSAA witness on this issue, head University of Michigan (U of M) women's basketball coach Sue Guevara, testified that recruiting in basketball begins long before an athlete's senior year and can, in some cases, start as early as before the ninth grade. (Tr. at 887:19-888:6, 899:17-900:1, S. Guevara.) Ms. Guevara testified that she sees many other women's basketball coaches from around the country, including from prestigious women's basketball programs, at the top girls' games in Michigan, since before the beginning of October, attending high school games does not count against the forty "contact" limit placed on coaches by the NCAA.[13] (Tr. at 886:7-17, S. Guevara.) In addition, it is more convenient for college coaches to attend high school games during this time since the women's college practices have not started yet. (Tr. at 886:22-887:1, S. Guevara). Ms. Guevara indicated that these factors result in more visibility for Michigan's girls to be recruited, and that she believed that she and her staff would not have the same opportunities to watch and evaluate Michigan girls if they

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[13] For purposes of recruiting for collegiate basketball, a "contact period" is when a college coach may contact the athlete and her parents, and coaches are allowed three of those contacts after the period begins. (Tr. at 888:17-19, S. Guevara.) An "evaluation" is when the coach watches the athlete play or asks the athlete's high school for the athlete's transcript. (*Id.* at 888:20-24.)

play in the winter season. (*Cf.* Tr. 885:18-20; 891:17-892:19, S. Guevara.)[14]

On the other hand, Plaintiffs point out that to the extent that college basketball recruiting occurs at club tournaments in the fall, Michigan girls cannot play at such tournaments, and therefore cannot be seen by out-of-state recruiters at those events. (Tr. at 911:18-913:5, S. Guevara (testifying that 18 Blue Chip tournaments occur in the fall at which she evaluates and recruits players).) Ms. Guevara's response to Michigan girls' inability to attend these fall tournaments was that "they don't need to." (*Id.* at 913:3-5.) Michigan college coaches are also still able to attend summer AAU basketball tournaments, where every women's college

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[14] Ms. Guevara also testified that of the forty evaluation days given to women's basketball programs, U of M's program has used between twenty and twenty-five of its annual evaluation days on Michigan girls. (Tr. at 891:5-16, S. Guevara.) It is unclear to the Court, however, whether that number of days would still be used on Michigan girls if the season of play was switched to winter, since U of M women's basketball would obviously continue to use all forty allowed days to evaluate players. The change to winter would not necessarily mean that fewer days than are used now would go to Michigan girls, since they would be playing at the same time that almost every other girls' team in the nation is. Presumably, U of M also has some level of commitment to recruiting Michigan girls since U of M is a public university. But the Court is clear on Ms. Guevara's general point that she believes that Michigan girls would not be at the same recruiting advantage by playing in the winter.

The MHSAA also provided circumstantial evidence of its recruiting advantages argument by asserting that fifteen female recipients of the Miss Basketball title, given to the top player in the state annually, have played collegiate basketball at out-of-state colleges and universities, whereas only six Mr. Basketballs have done so. (Tr. at 777:4-778:6, K. McGee; Tr. Exh. 285.) The Court places very limited weight on this evidence, and certainly much, much less weight than the testimony of Ms. Guevara. These lists of where the single best player in Michigan was recruited do not prove that recruitment is increased for girls playing in the fall, but is only weak circumstantial evidence of that conclusion. If recruitment were increased, the list does not explain if the fall season alone is the reason or if other factors are present, to what extent all other female basketball players in Michigan are recruited besides the single best player, or what effect moving the season to the winter would have.

basketball program is in attendance. (Tr. at 905:9-14, 909:4-7, S. Guevara.)

Plaintiffs also argued that if Michigan girls played in the winter, college coaches would still be able to recruit them just as they recruit girls outside of Michigan. For example, the University of Michigan's women's basketball team plays on Thursdays and Sundays in the winter. (Tr. at 892:1-8, S. Guevara.) If Michigan girls played in the winter on Tuesdays and Fridays—as Michigan boys do—U of M's coaching staff would be able to attend Michigan girls' high school games on those days, even if they conflict with U of M's practice times.

NCAA recruiting restrictions prevent college coaches from watching and evaluating basketball players during "quiet periods" and "dead periods," as defined in the NCAA Manual. (Tr. Exhs.5, 7, 65-66.) During the winter season, however, the NCAA does not set any quiet periods. Instead, the "evaluation period," when players can be observed off-campus, runs October 8-February 28, and the "contact period," when off-campus, in-person recruiting contacts can be made, runs March 1-26. (Tr. Exh. 5 at 3-4; Tr. Exh. 7 at 9.)[15] Thus, the period when recruiters can observe high school players runs through the fall and winter seasons. The period when recruiters can contact players off-campus is during the winter season.

Plaintiffs also argue that Michigan girls face some recruiting restrictions because of the fall basketball season. In 2001-02, for Division I schools, the NCAA has set "quiet periods" when in-person recruiting contacts are limited to campus visits, for August 1-September 8 and September 30-October 7. (Tr. Exh. 5 at 3-4 (Excerpts from 1999-00 NCAA Recruiting Manual, pages 88-89); Tr. Exh. 7 at 9 (2001-02

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[15] The NCAA limits Division I colleges to forty evaluation days during the evaluation period and sixteen contact days during the contact period. Those days not designated by the college as an evaluation day or contact day are treated as quiet period days. (Tr. Exh. 7 at 9.)

NCAA Guide for the College-Bound Student-Athlete).) The NCAA has also set a "dead period," when no contacts are permitted, for November 12-15. *Id.* In 2001-02, practice and the regular season for Michigan girls began during the first quiet period. (Tr. Exh. 9(a) at 113.) During these quiet periods, Michigan girls are playing high school games, presumably making on-campus visits more difficult.

B. Girls' Volleyball

The Court finds that the MHSAA's scheduling of girls' volleyball in the winter, not a traditional season for girls' volleyball, disadvantages girls in several remarkable ways described in this section. Other scheduling decisions have forced girls' volleyball into a non-traditional season, unlike the other sports with only boys' teams. In volleyball, the non-traditional season is the disadvantageous season for girls.

In 1999-2000, 20,934 girls played volleyball for MHSAA member schools, the largest number of participants in a MHSAA girls' sport. (Tr. Exh. 99 at 42-43 (1999-2000 Athletics Participation Survey).)[16] The MHSAA schedules the volleyball state championship tournament in the winter. (Stip. Fact No. 42.) For 2001-02, the MHSAA set the first practice date as November 15, the first contest date as December 8, and the end of the season as March 16. (Tr. Exh. 9(a) at 113 (2001-02 MHSAA Quick Reference Calendar).) This means that Michigan high school girls' volleyball is played in the winter season.

The traditional playing season for women's volleyball is the fall. (Tr. at 497:21-498:1, Donna Lopiano.) Forty-eight states play high school girls' volleyball in the fall. (Tr. Exh. 256 (National Federal Sport Season Surveys)).[17] The

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[16] The 1999-2000 participation data is found at the last two pages of Trial Exhibit 99.

[17] As a result of litigation, three states will soon be switching their girls' volleyball to fall and girls' basketball to winter, and one state is

NCAA schedules women's volleyball in the fall. (Tr. at 246:8-9, Bette Norman-Nakamura[18] Testimony.) Although the MHSAA does not currently sponsor boys' volleyball, the MHSAA's executive staff and volleyball committee have recommended that once the sport is adopted, it be played in the spring when the NCAA schedules men's volleyball. (Tr. Exh. 79 at 2 (Excerpts from Spring 1997 MHSAA Representative Council Meeting Agenda).)

College volleyball recruiting focuses on the amateur, private club programs, like those sponsored by an organization called the United States Volleyball Association (USAV),[19] rather than the high school programs because of recruiters' ability to see a far larger number of players in a single setting than at a high school contest or tournament. (Tr. at 326:20- 327:6, Charles Erbe[20] Testimony) (testifying that a recruiter can only see twenty-four players at a high school match or 100 players at a high school tournament compared to as many as 5,000 players at a USA Volleyball

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voluntarily doing so, bringing the total to forty-eight states who schedule those girls' sports that way.

[18] Ms. Norman-Nakamura, who testified on behalf of Plaintiffs, is a teacher with Warren Consolidated Schools in the Detroit area, and a past president of the Michigan Interscholastic Volleyball Coaches Association. (Tr. at 200:17-21, 226:5-21, B. Norman-Nakamura.) She has been coaching volleyball at various levels and in various programs since the 1960s. (*Id.* at 202:3-15.)

[19] This was the acronym used by witnesses to refer to this organization.

[20] Mr. Erbe is head women's volleyball coach at Michigan State University and testified on behalf of Plaintiffs. (Tr. at 321:22-23, C. Erbe.) He began his coaching career working with girls' high school programs in California. (*Id.* at 323:4-13.) He founded the United States Junior National Volleyball Program, which provided most of the players to the 1980 and 1984 USA Olympic women's volleyball teams. (*Id.* at 323:24-324:17). He also coached the University of Southern California's women's volleyball team to four national championships. (*Id.* at 324:19-325:10). His teams at Michigan State have perennially finished near the top of the Big 10 Conference standings and participated in the NCAA tournament. (*Id.* at 325:21-326:6.)

tournament held over a two to three-day period). The recruiting that occurs in Michigan during the high school girls' volleyball season is mostly limited to smaller in-state schools. (Tr. at 330:8-21, C. Erbe; Tr. at 383:7-16, K. Eveland; Tr. at 427:5-12, Sharon Schatz[21] Testimony.)

The USAV and AAU, another private club program, seasons for high school age players to play in their amateur programs are from January through June or July. (Tr. at 206:3-207:5, B. Norman-Nakamura.) MHSAA rules prohibit athletes from participating in USAV or AAU club volleyball during their December through March high school season. (*Id.* at 221:21-24; Tr. Exh. 9.)

The most competitive club volleyball programs are sponsored by USAV, the sport's national governing body. (Tr. at 327:3-7, C. Erbe; Tr. at 382:15- 383:3, Kele Eveland; Tr. at 1066:7-10, Phil Wilson[22] Testimony.) Outside of Michigan, the USAV club season for high school age girls begins in early January and continues through early July. (Tr. at 206:8-14, B. Norman-Nakamura.)

Michigan girls who participate in high school volleyball are not able to participate in USAV club volleyball until April, after the MHSAA season has ended, while players in other states have been playing club volleyball since January. (Tr. at 328:1-22, C. Erbe.) The MHSAA prohibits students from playing on any team other than a school team during the MHSAA-defined season in that sport. (Tr. Exh. 9(a) at

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[21] Ms. Schatz is president of the Michigan Junior Volleyball Association and coached women's volleyball at Aquinas College, a National Association of Intercollegiate Athletics (NAIA) school, for 15 years. (Tr. at 411:8-13, S. Schatz). She testified on behalf of Plaintiffs.

[22] Mr. Wilson, a teacher at Kalamazoo Valley Community College and the head volleyball coach at Kalamazoo Central High School, testified on Defendant MHSAA's behalf. (Tr. at 1045:11-17, P. Wilson.) He has coached volleyball at Kalamazoo Central for ten years, and his team won the Class "A" state championship in 1996. (*Id.* at 1047:8-13.)

43 (Regulation I, § 13); Tr. at 453:10-19, Jack Magelssen Testimony.)[23]

By the end of the MHSAA season, most of the regional and national USAV tournaments have been filled by non-Michigan teams. When there are openings, Michigan club teams are placed "at the very bottom of the tournament where they do not get a chance to compete at the high levels because they haven't been competing, they don't have a power rating, [and] they don't have the ranking that other teams do when they do the [seeding]." (Tr. at 328:4-12, C. Erbe; Tr. at 441:7-15, J. Magelssen.)

Michigan club teams have difficulty excelling at these tournaments because they are becoming accustomed to playing with new teammates and a new coach while their competitors have already been playing together for four months. (Tr. at 446:4-14, J. Maglessen.)[24] It is therefore more difficult for recruiters to evaluate Michigan players at these tournaments. (*Id.* at 446:15-19.)

Playing high school volleyball in the winter rather than the fall affects Michigan girls' ability to be recruited in two ways. First, they are not seen by college coaches who go to the USAV club tournaments to recruit. (Tr. at 328:23-329:3, C. Erbe; Tr. at 386:3-22, K. Eveland.) Second, they miss out on "the experience of competing against a broad base of competition." (*Id.* at 329:3-14, C. Erbe.) This experience is

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[23] Mr. Magelssen is a teacher and head volleyball coach at Portage Northern High School, where his teams have won ten state championships. (Tr. at 435:6-9, 436:2-9, J. Magelssen.) Mr. Magelssen has been named MHSAA Class A coach of the year ten times, was a finalist for national coach of the year in 1987, and was national coach of the year in 1994. (*Id.* at 439:13-20, 440:2-9.) He has also coached USAV and AAU club volleyball since 1984. (*Id.* at 437:23-438:18.) He testified on behalf of Plaintiffs.

[24] When the Michigan club teams are formed they are essentially new teams because MHSAA rules prohibit more than three players from a single school team from playing for their school coach "outside of the MHSAA-defined season for [that] sport." Tr. Exh. 9(a) at 55 (Regulation II, § 11(G)1.e.).

instrumental in forging a player's psychological framework and confidence that she can "compete against anybody at any level." (*Id.*)

Because of the shortened club season for Michigan girls, over a four-year high school career, they will have 16 months less of competitive training and experience compared to girls in the 48 states that play high school volleyball in the fall. (Tr. at 330:22-331:8, C. Erbe.) This shortened experience disadvantages Michigan girls because recruiters are looking for players "with the most experience." (*Id.* at 331:9-19, 441:5-7, J. Magelssen.) This limited experience affects even those girls who are eventually successfully recruited to play in college volleyball programs. (Tr. at 342:1-7, C. Erbe (observing that his Michigan recruits come into college "less confident," "scared," and "afraid to make mistakes" compared to his out-of-state recruits).)

For example, Kele Eveland,[25] an All-State volleyball player as a junior and senior, received only one handwritten letter[26] from smaller Division II schools during the MHSAA volleyball season. (Tr. at 387:18-23, K. Eveland.) Similarly, Breanna Eveland, a first-team All-State volleyball player as a sophomore and junior, has thus far received only one scholarship offer from a small Division I college and was not currently being recruited by any other schools at the time of trial.[27] (Tr. at 635:2-637:7, B. Eveland.)

In addition, the limits placed on the experience gained by Michigan high school female volleyball players as a result

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[25] In addition to her on-the-court success, Ms. Eveland graduated from high school with a 4.0 grade point average and was valedictorian. (Tr. at 378:8-10, Kele Eveland.) At Georgia Tech, Ms. Eveland made the dean's list both semesters of her freshman year. (*Id.* at 37:12-16.)

[26] A handwritten letter is a personalized letter to the recruit and indicates a higher level of interest from the college than a typewritten form letter. (Tr. at 388:4-10, K. Eveland.)

[27] In addition to playing numerous varsity sports, Breanna Eveland has maintained a 3.4 grade point average. (Tr. at 636:4-5, B. Eveland.)

of playing school volleyball in the winter are increasing. "[E]xperience is becoming an overwhelming factor in the recruiting process, and there just aren't Michigan girls that are at that level." (Tr. at 333:15-20, C. Erbe.) Michigan State's women's volleyball team has no recruited Michigan players as freshmen. Nor will Michigan State have any Michigan players among the incoming freshman recruits in 2002-03. (*Id.* at 333:12-14.)

The MHSAA high school season also disadvantages Michigan girls seeking college athletic scholarships because it occurs after the NCAA's early signing date. Under NCAA rules, high school athletes can first commit to a college program during the second week of November. While there is a subsequent signing date in the spring, the majority of players sign on the first date. (Tr. at 331:20-332:5, C. Erbe.) As a result, a Michigan player is placed at a "severe disadvantage to her counterparts around the nation who are playing high school volleyball in the fall," and whose season is completed or nearly complete by the first signing date. (*Id.* at 332:14-18.) As Mr. Erbe testified:

> [L]et's say I have one scholarship left and I'm looking at a young lady from Illinois and I'm looking at a young lady from Michigan. Because the high school season is in the fall in Illinois, I can go watch that young lady compete to get a final evaluation before I make a decision. I cannot watch the Michigan player because her high school season does not start until after the signing date.

(*Id.* at 332:6-14.)

These recruiting disadvantages affect not only Michigan's elite volleyball players but also Michigan girls with a broad range of ability who could be recruited by smaller Division I programs, Division II and Division III programs, and NAIA programs. (Tr. at 329:19-330:7, 332:19-23, C. Erbe.) These disadvantages not only cost girls opportunities to participate in college athletics but further

harm those girls who, without athletic scholarships or related financial assistance, would be unable to afford to attend college or to attend the college of their choosing. (*See* Tr. at 380:6-16, K. Eveland; Tr. at 562:8-15, Breanne Hall Testimony.) The average Michigan high school volleyball player is two to three years behind players in other states. (Tr. at 369:3-6, C. Erbe.)

Michigan girls cannot be named to All-American teams and their teams cannot participate in national rankings and polls. (Tr. at 444:9-445:1, 447:5-12, J. Magelssen.) This lack of recognition further hinders girls' ability to be recruited nationally. (*See* Tr. at 501:25-502:2, D. Lopiano.)

In addition to reducing college athletic opportunities, Michigan girls' inability to participate in club volleyball programs is itself harmful. Girls miss opportunities to further develop technical skills, as well as the opportunity simply to play. Over the course of a high school career, girls will play sixteen months fewer of volleyball than they otherwise could if volleyball were scheduled in the fall because of the conflict between the club and high school playing seasons. (Tr. at 330:22-331:8, 331:9-19, C. Erbe; Tr. at 441:5-7, J. Magelssen.)

Club volleyball benefits not only the elite player but the "grass roots" player who wants to develop her skills in order to make her high school team. (Tr. at 414:8-12, 429:1-5, S. Schatz ("the players in Michigan are at a disadvantage, whether they are elite or whether they are the kid just trying to make the "A" team in high school because they have restricted amount of time that they can practice out of season, [and] attend clinics").)

In addition, this limits opportunities for girls who live at or near Michigan's borders to participate in volleyball clubs that are close in distance to them. Lynn Kostreva, a teacher and head volleyball coach at Menominee High School, testified that her daughters have been invited to compete on club volleyball teams in Wisconsin but are unable to do so because the Wisconsin club season conflicts with the

MHSAA season. (Tr. at 160:1-5, 178:11-23, L. Kostreva.) Menominee is in Michigan's Upper Peninsula, which borders Wisconsin.

Michigan girls are not able to attend college volleyball matches as a team with their coach because MHSAA prohibits such a gathering from occurring out-of-season. (Tr. Exh. 9(a) at 55 (Regulation II, § 11(G)1.e.); *see* Tr. at 180:14-181:8, L. Kostreva (testifying that, because the collegiate season and clinics occur outside of the MHSAA season, she cannot organize and accompany her volleyball team to these events).) Again, such experiences provide "inspirational and aspirational images" to girls. (Tr. at 502:3-10, D. Lopiano.)

As a result of the MHSAA winter season for high school play, Michigan club teams must travel to tournaments as far away as California, Texas and Colorado rather than playing in tournaments in neighboring states, like Indiana, because these later tournaments occur during the MHSAA season or immediately thereafter. (Tr. at 451:18-452:9, J. Magelssen.) Travel greatly increases the cost to play club volleyball, thereby limiting the number of players who can afford to play. (*Id.* at 452:22-453:3 (testifying that playing in annual Indianapolis tournament would cut club expenses by 50 percent).)[28] This kind of travel would also have an effect on academics and other activities of students involved and could make participating in club opportunities impossible.

High school volleyball teams located near Michigan's bordering states are not able to compete against teams in those states. (Tr. at 170:5-10, 175:12-22, L. Kostreva.) For example, Menominee High School is located within 50 miles of numerous Wisconsin high schools that would require shorter travel time for contests. (*Id.* at 175:3-11.) Because of the MHSAA season, however, Menominee is limited to

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[28] To pay for club expenses, players, in addition to parental assistance, seek sponsors, work part-time jobs, and hold fund-raisers. (Tr. at 380:22-381:6, K. Eveland; Tr. at 453:4-8, J. Magelssen.)

competing against Michigan schools. Contests at schools in Menominee's conference require an average travel time of 90 minutes each way, with the longest trip lasting three hours each way. (*Id.* at 171:25-172:8.) Contests at non-conference schools require even longer travel. (*Id.* at 172:9-15.) In order to arrive on time for an away contest at a non-conference school, Menominee's volleyball team leaves in the middle of the school day and does not return until approximately midnight. (*Id.* at 172:16-173:8.) Because Menominee plays most of its games on Monday and Thursday nights, most of this travel occurs during school days and school nights. (*Id.* at 173:9-13.) In addition, winter weather concerns for travel in the Upper Peninsula, or for locations in Michigan located near any state border, make shorter distances favorable for sports played in the winter season.

Menominee's boys' sports teams, however, are able to play teams from other states. (Tr. at 175:12-22, L. Kostreva (stating that Menominee boys compete against Wisconsin schools in basketball, football and wrestling).) Thus, Menominee's boys can travel as little as five minutes to play a game. (*Id.* at 198:7-14.)

Michigan volleyball players also have difficulty in obtaining specialized volleyball equipment, particularly shoes, because inventories have been depleted by college and high school teams throughout the country before the MHSAA volleyball season begins. (Tr. at 35:7-37:11, D. Madsen; Tr. at 97:5- 17, Kristi Madsen Testimony; Tr. at 114:6-17, Kelsey Madsen Testimony.)

The MHSAA's volleyball witness, Mr. Wilson, testified that girls benefit from playing both basketball and volleyball because the skills possessed by most volleyball players—jumping ability and lateral quickness— are valuable in both sports. (Tr. at 1050:11-18, P. Wilson.) There was no evidence, however, showing that girls who play both sports would be denied these skill-related benefits if MHSAA switched the volleyball and basketball seasons. Also, if the

girls' volleyball and basketball seasons were switched, volleyball players who desired to play on the basketball team, too, would still have the choice to do so and not participate in club volleyball. The MHSAA also presented no evidence to indicate why facilities problems would prohibit rescheduling of girls' volleyball from the winter to the fall, particularly if it were to be switched with girls' basketball.[29]

The MHSAA is correct that Michigan girls and their high school coaches have had success in volleyball in which the entire state can take pride. (*See, e.g.*, Tr. Exh. 275; Tr. at 456:5-457:11, J. Magelssen (discussing the great success of 1994 Kalamazoo Dead Frogs in USA Volleyball).) However, the MHSAA failed to prove whether this indicates that the winter, non-traditional volleyball season is not a disadvantage, or whether this merely indicates that the season is a disadvantage that Michigan girls have worked to overcome. The testimony offered by Plaintiffs convinced this Court that the latter is the correct conclusion.

C. Girls' Soccer

After hearing the evidence, the Court finds that the spring season is the inferior season, as compared to fall, for playing soccer in Michigan. Besides the evidence presented on this point, which was more than sufficient standing alone, the fact that the MHSAA originally scheduled both teams to play in fall, for reasons including the financial advantage to

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[29] Defendant MHSAA also asserted that the winter volleyball season provides Michigan girls with the ability to play two to three times the number of matches than those competing in states with a fall volleyball season. However, the MHSAA could only provide inadmissible hearsay testimony to support this assertion, which the Court may not consider. (Tr. at 1051:10-12, 1064:3-19, P. Wilson.) In addition, unless Mr. Wilson counts tournament matches or some other special circumstances, this assertion does not make logical sense, assuming that the fall and winter seasons are approximately the same length. Certainly the winter season is not two to three times as long as fall, although sometimes it may feel that way in Michigan.

conducting both programs at the same time, is additional circumstantial evidence that fall is a superior soccer-playing season in Michigan. Some anecdotal evidence was presented that logistical problems would occur if both sexes played soccer in the fall or in one season generally, but that evidence was insufficient for the Court to make a finding that logistical problems, if they exist, are insurmountable now or ever.

In 1999-2000, 11,921 girls played soccer for MHSAA member schools. (Tr. Exh. 99 at 42-43.) MHSAA schedules the girls' soccer state championship tournament in the spring. (Stip. Fact No. 21.) For 2001-02, MHSAA set the first practice date as March 11, the first contest date as March 22, and the end of the season as June 15. (Tr. Exh. 9(a) at 113.) This places Michigan girls' soccer in the spring season.

The NCAA schedules women's soccer in the fall. (*See* Trial Exhibit 40 at 2.) There does not appear to be one clear season in which high school girls play in soccer across the nation, but a number of states employ a number of different scheduling mechanisms for soccer.[30]

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[30] According to the Court's review of Trial Exhibit 256, twenty-seven states schedule girls' high school soccer in the fall. (Tr. Exh. 256.) Twenty-two states schedule high school soccer in the spring. (*Id.*) Three southern states, Texas, Louisiana, and Mississippi sponsor girls' and boys' soccer in the winter. (*Id.*) These numbers do not add up to fifty-one (counting the District of Columbia), though, because thirty-six states schedule both sexes to play soccer in the same season, which varies between a single fall or single spring season. (*Id.*) Trial Exhibit 256 does not indicate whether those states sponsoring both sexes in the same season have separate-sex teams or if they sponsor co-ed soccer. (*Id.*) The Court also has no indication of how many schools in Michigan may sponsor co-ed soccer teams.

In addition, states using different seasons for male and female soccer sometimes scheduled boys in spring and girls in fall. A couple of states also sponsored multiple seasons, either both fall and spring or all three seasons, for both girls and boys. (*Id.*) This might mean that there is some arrangement where boys' and girls' junior varsity plays together in one season, and the varsity teams of both sexes play in another. Two states

The MHSAA schedules the boys' soccer state championship tournament in the fall, at the same time that the NCAA schedules men's soccer. (Stip. Fact No. 21; Tr. Exh. 40 at 2.) In 2001-02 boys' soccer, the first practice date was August 13, the first contest date was August 24, and the end of the season was November 10. This places Michigan boys' soccer in the fall season. Plaintiffs' expert Ms. Lopiano testified that the traditional playing season for soccer is the fall. (Tr. at 497:8-10.)

The MHSAA's scheduling of girls' soccer in the spring in Michigan disadvantages girls in several ways. Soccer fields in Michigan are often still frozen or snow-covered when the girls' season starts in the spring, so girls are forced inside for practice and tryouts. (Tr. at 598:17-601:17, D. Adrianse; Tr. at 622:14-623:1, Angie Adrianse[31] Testimony; Tr. at 1163:13-1164:2, T. Miller.) Thus, the regular season starts later than scheduled. (*Id.* at 602:7-12, Daniel Adrianse[32] Testimony.) As a result, Michigan girls must play three games a week over the course of the season to make up postponed games whereas Michigan boys play two games per week over the course of their season. (*Id.* at 601:22-602:15.)

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do not sponsor soccer at all, and one state did not report seasons for girls' sports. (*Id.*)

[31] Angie Adrianse currently attends Michigan State University and graduated from Caledonia High School in 2000. (Tr. at 621:11-18, A. Adrianse.) She testified on behalf of Plaintiffs. During high school, she participated in basketball, volleyball, soccer and cross-country, including playing four years of varsity soccer. (*Id.* at 622:1-8.) She received numerous soccer honors, including All Conference, All District and All Region her junior year. (*Id.* at 622:10-13.) She now plays club soccer for MSU. (*Id.* at 621:24-25.)

[32] Daniel Adrianse is the father of two daughters who played high school sports while attending high school. (Tr. at 593:6-8, 19-24. D. Adrianse.) He is also a member of Communities for Equity and testified on behalf of Plaintiffs. (*Id.* at 9-10.) His younger daughter, Angie Adrianse, also testified on behalf of Plaintiffs.

The increased number of games per week causes a greater risk of injury for girls that Michigan boys do not face. (Tr. at 602:18-603:17, D. Adrianse) (testifying that his daughter Angie's teams and teams she competed against suffered "a lot of injuries" as a result of playing three days a week); Tr. at 623:2-6, A. Adrianse (testifying that playing three days a week is "really hard on your body" and "practices can't even be much because you're exhausted").

Girls playing soccer in spring have some post-season tournament dates that occur after the end of the school year, so because there is no ability for contemporaneous in-school promotion of these games, it is less likely that there will be as much student or other fan support as there is for boys' soccer games. (Tr. at 604:11-607:3, D. Adrianse; Tr. at 623:15-624:25, A. Adrianse.)

Girls' opportunities for collegiate recruitment are decreased because college scholarships for soccer are awarded in November and April. (Tr. Exh. 5 at 19-20.) Recruiters will not have had an opportunity to see female soccer players in Michigan in their senior year of high school before awarding first-round November scholarships because girls start their competitive season in late March. (Tr. at 504:6-14, D. Lopiano.) Michigan boys play during the fall season and are able to have four years of high school competition for college recruiters to consider.

The MHSAA's soccer witness was Thomas Miller, a retired teacher who coaches boys' and girls' soccer at Midland Dow High School and former president of the Michigan High School Soccer Coaches Association. (Tr. at 1135:9-19, 1137:3-6, Thomas Miller Testimony.) Asked by MHSAA whether the fall or the spring is advantageous for recruiting, Mr. Miller responded only that "most of the top level players are recruited before their senior year."[33] (*Id.*

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[33] Of course, that conclusion begs the question. If girls are playing in the spring, it is obvious that recruiting would be forced to take place before the senior year for female players. That does not answer whether

at 1153:10-15.) Nor was Mr. Miller able to identify when the NCAA letter of intent signing date is for soccer. (*Id.* at 1164:7-9.)

The United States Soccer Federation (USSF) and the American Youth Soccer Organization (AYSO) club soccer seasons for high school age players take place in the spring. The Olympic Development Program (ODP) for soccer takes place during spring and summer for high school age soccer players. Because MHSAA rules prohibit athletes from playing high school sports and club sports during the same season, girls but not boys lose opportunities to participate in USSF, AYSO, and ODP programs. (Tr. at 626:11-629:8, A. Adrianse; Tr. at 504:15-24, D. Lopiano; Tr. at 1168:2-16, T. Miller.) There is some private club soccer in the fall for girls, so in the event that Michigan girls played high school soccer in the fall, girls would have to choose between those programs. (Tr. at 630:18-631:10, A. Adrianse.)

Again, Michigan girls cannot play against schools in the bordering states of Ohio and Indiana because these states conduct girls' soccer in the fall, whereas Michigan boys could compete in both states. (Tr. Exh. 256 at 15, 36.) But two of Michigan's border states, Illinois and Wisconsin, schedule soccer in separate seasons as Michigan does, with their girls and boys playing in the same seasons as Michigan. (Tr. at 1170:13-1171:7, T. Miller; Tr. Exh. 256 at 14, 23, 50.)

Plaintiffs' witness testified that Michigan girls cannot participate in national rankings or All-American individual rankings because their interscholastic season takes place after the fall traditional season. (Tr. at 504:2-5, D. Lopiano.)

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this is a detriment particular to playing in a spring soccer season, or if recruiting would still take place prior to the senior year even if girls played in fall. It also does not provide any information with respect to players who are not "top level" but who, if they were provided with equal opportunities in high school programs, might still be able to obtain non-scholarship spots on collegiate teams, scholarships in less prestigious collegiate soccer programs, or partial scholarships at better collegiate soccer programs.

Of course, reduced visibility would negatively affect ability to be recruited and produces the general disadvantage of less recognition. (*Id.*) Mr. Miller indicated that Michigan girls still have the opportunity to be nationally ranked, but did not indicate the extent to which they have been ranked or if that opportunity is at all impacted by the spring season. (Tr. at 1150:19-1152:19.) The Court therefore does not know whether the ranking takes place during the fall, and thus it is more difficult for girls to be ranked because they are relying on their distant spring season performance, or if there are special spring rankings for high school girls' teams.

There are a few advantages to playing in the spring that girls currently reap. Girls' soccer games are frequently scheduled on Friday nights in the spring season; boys' soccer games are not or are infrequently scheduled on Friday nights in the fall because of the conflict with boys' football games. (Tr. at 1148:19-1149:7, T. Miller; *see also* Tr. at 144:13-147:3, C. Engel.)

In addition, it is more difficult to obtain and provide experienced high school soccer officials during the fall season because colleges also compete in the fall. (Tr. at 1144:13-21, T. Miller.) High schools obtain better officials in the spring during the girls' season. (*Id.* at 1144:22-23.) Even though it appears that sufficient numbers of people are registered to officiate soccer, registration of soccer officials with the MHSAA does not suggest that officials are either available to work, competent or experienced. (Tr. at 1158:1-4, 1172:13-17, T. Miller.)

Mr. Miller's concerns about changing seasons, however, were all in terms of potential logistical problems that would occur if the seasons were combined, and not if boys' and girls' seasons switched with each other. Approximately one-third of Michigan high school soccer coaches coach both boys' and girls' soccer at their respective schools. (Tr. at 1140:14-19, T. Miller.) It would be difficult to coach both teams during the same season, so some existing coaches

would lose one of their coaching positions, and new coaches would have to be hired. (*Id.* at 1141:8-13, 1156:23-1157:1.) The quality of the surfaces of soccer fields will also decline with twice as many players on them. (Tr. at 1147:22-1148:4, T. Miller.)

Mr. Miller testified that he believes that if boys and girls play soccer in the same season, participation opportunities will decline because schools will have to cut team offerings as a result of logistical problems like finding sufficient officials, coaches, and fields. (Tr. at 1153:24-1154:8, T. Miller.) However, because of the lack of more specific evidence on these points, the Court is not convinced that either alternatives to these problems could absolutely not be found or that these problems would not be able to be resolved after a period of adjustment.

D. Lower Peninsula Girls' Golf

The Court finds that in Michigan, fall is the more advantageous season for playing high school golf. Again, there was plenty of direct evidence to support this finding, but the fact that the boys' golf program, which was in existence first, was moved from spring to fall also lends circumstantial evidence to the Court's conclusion. Moreover, there was no evidence that logistical difficulties would pose a problem in scheduling boys' and girls' golf at the same time.

In 1999-2000, 3,564 girls played golf for MHSAA member schools. (Tr. Exh. 99 at 42-43.) The MHSAA schedules the Lower Peninsula girls' golf state championship tournament in the spring, at the same time that the NCAA schedules women's golf. (Stip. Fact No. 38; Tr. Exh. 40 at 2.) The MHSAA schedules the golf state championship tournament in the spring for Upper Peninsula boys and girls. (Stip Fact No. 39.) For 2001-02, MHSAA set the first practice date for Lower Peninsula girls' golf as March 11, the first contest date as March 14, and the end of the season as June 1. (Tr. Exh. 9(a) at 113.) This places Lower Peninsula girls' golf in the spring season.

The MHSAA schedules the Lower Peninsula boys' golf state championship tournament in the fall, while the NCAA schedules men's golf in the spring. (Stip Fact No. 37; Tr. Exh. 40 at 2.) For 2001-02, MHSAA set the first practice date for Lower Peninsula boys' golf as August 9, the first contest date as August 13, and the end of the season as October 20. (Tr. Exh. 9(a) at 113.) This places the Lower Peninsula boys' golf season in the fall.

Lower Peninsula boys' golf used to be in the spring, but the MHSAA moved it to the fall season in the 1970s so that boys' golf teams would have better access to golf courses. (Tr. Exh. 10(a) at 6.) The MHSAA scheduled Lower Peninsula girls' golf in the spring, which was the season it had previously determined was less advantageous when it moved boys' golf. (Tr. Exh. 10(a) at 29.)

The traditional playing season for golf is the spring. (Tr. at 497:14-16, D. Lopiano.) But Breanne Hall, who played high school golf for East Kentwood High School and now plays college golf for University of Toledo, testified that fall is the better season for golf in Michigan for a number of reasons.[34] (Tr. at 565:6-569:4.)

In Michigan, it is easier to obtain tee times in the fall rather than the spring, and it is easier to obtain "the use of better courses." (Tr. at 567:8- 14, B. Hall; Tr. Exh. 29 at 2 (1973-74 MHSAA Bulletin, vol. L, p. 6).) It is easier to obtain tee times in fall because "[a] lot of people have had all summer to play. By the time when the fall rolls around, a lot of people have put their clubs away. And when the weather starts to get nice [in the spring], everyone [in the general public] is ready to get out there and start playing." (Tr. at 567:11-14, B. Hall.) Thus, girls' teams must compete more with members of the general public for tee times than they would in fall.

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[34] Ms. Hall has earned academic honors as well. She graduated with a 3.8 grade point average from high school and has earned a 3.7 grade point average thus far in college. (*Id.* at 562:2-7, 563:10-12.)

In Michigan, the golf courses are in better condition during the fall season. (*Id.* at 565:12-18.) Girls are more likely to face cold, icy weather and frozen or muddy golf course greens in the spring and do not have the advantage of starting the season on a course which has been groomed all summer. (*Id.* at 565:12-21; Tr. at 511:5-15, D. Lopiano.) Michigan boys in the Lower Peninsula enjoy these course conditions and availability while Michigan girls do not.

In addition, because the NCAA letter of intent signing date is in early November, Michigan boys have four years of golf experience and scores on which to be evaluated. (Tr. at 564:19-565:1, B. Hall.) Michigan girls only have three years because their season occurs after the letter of intent signing date. (*Id.*)

For example, Ms. Hall, an All-State golfer as a junior and senior, was ranked among the top eight female high school golfers in the state and finished third in the state championship tournament. (Tr. at 561:13-17.) Notwithstanding her outstanding senior season, Ms. Hall only received a 50 percent scholarship to Northern Kentucky University, a Division II college, to play golf. (*Id.* at 558:24-559:7, 561:13-17.) After having a successful freshman year at Northern Kentucky and competing in a tournament against Division I teams, Ms. Hall received a 75 percent scholarship to play golf at the University of Toledo, a Division I college, where she currently attends. (*Id.* at 558:17-19, 559:8-13, 559:24-560:4.)

Moreover, Michigan boys go straight from summer play to their high school fall season, allowing them to maintain their peak condition and low scores. (Tr. at 565:24-566:8, B. Hall.) Weather conditions do not allow golf courses to stay open during the winter months. (*Id.* at 565:19-21, B. Hall.) As a result, Michigan girls begin their spring high school season without the benefit of playing during the winter and score more poorly. (*Id.* at 565:22-566:8.) This affects the recruiting opportunities for Michigan girls because

"obviously the coaches want the players with the lower [better] scores." (*Id.* at 566:14-18.)

The MHSAA pointed out that the spring season has the advantage of being the time when daylight hours are longer, so it is easier to play eighteen holes of golf without missing school than it is in the fall. (Tr. at 571:11-17, B. Hall.) However, this advantage hardly makes up for the other disadvantages of the spring golfing season.

No significant evidence was introduced to assert that logistics would make maintaining both the girls' team and the boys' team in the same Lower Peninsula golf season difficult or impossible. In addition, Plaintiffs' expert opined that boys and girls golfing together would gain psycho-social benefits from co-ed training and could play mixed tournaments or matches. (Tr. at 668:12-669:11, 706:20-709:17, L. Bunker.)

E. Lower Peninsula Girls' Swimming and Diving

The Court finds that the winter season for swimming has advantages that outweigh advantages to swimming in fall. The parties presented reasons why they each believe that the fall or winter swimming season is more advantageous than the other season.

All other testimony presented objected to moving the girls' season because of concerns that both sexes in one season would create logistical problems. The Court finds that the opposition to moving girls' swimming to the same season as boys' swimming is mostly motivated by a desire to keep them in separate seasons for administrative convenience in utilizing facilities and coaches, and not particularly because there is a belief that the girls' swimming season is superior or equal to the boys' season. The Court also finds that the anecdotal evidence presented of potential logistical problems was insufficient to prove logistical problems would occur if both sexes swam in the same season. If logistical problems would exist, there was also insufficient evidence that those problems would not have solutions.

In 1999-2000, 6,652 girls participated in swimming and diving for MHSAA member schools. (Tr. Exh. 99 at 42-43.) The MHSAA schedules the Lower Peninsula girls' swimming and diving state championship tournament in the fall. (Stip. Fact No. 46.) For 2001-02, the MHSAA set the first practice date for Lower Peninsula girls as August 13, the first contest date as August 25, and the end of the season as November 17. (Tr. Exh. 9(a) at 113.) The setting of these dates puts the Lower Peninsula girls' swimming and diving season in the fall.[35] The MHSAA schedules the swimming and diving state championship tournaments in the winter for Upper Peninsula boys and girls. (Stip. Fact No. 47.) The entire season for both boys and girls in the Upper Peninsula is placed by the MHSAA in the winter because of the starting and ending dates.

MHSAA schedules the Lower Peninsula boys' swimming and diving state championship tournament in the winter. (Stip. Fact No. 45.) For 2001-02, MHSAA set the first practice date for Lower Peninsula boys as November 19, the first contest date as December 1, and the end of the season as March 9. (Tr. Exh. 9(a) at 113.) This places the Lower Peninsula boys' swimming and diving season in the winter.

The MHSAA rescheduled the girls' swimming season from fall to winter, as Plaintiffs request here, in 1990 because "[t]here had been ten years of effort to expand girls' opportunities in the winter or at least equalize girls' opportunities in the fall, winter, and spring seasons. The Council had statistical information from the Department of Education showing unequal opportunities for girls in the winter compared to boys and compared to girls'

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35 There was some indication that the NCAA schedules men's and women's swimming in the winter. (Tr. Exh. 40 at 2.) Ms. Lopiano also testified that the traditional season for swimming and diving is the winter. (Tr. at 497:17-20.) But Mr. Phill testified that college men's and women's teams swim from September and continue through the end of March. (Tr. at 1192:19-23.)

opportunities in the fall and spring seasons." (Tr. Exh. 44.) In response to this change of seasons, the Michigan Interscholastic Swim Coaches Association (MISCA) hired an attorney to advocate its opposition to this move to the MHSAA's Representative Council. (Tr. at 1196:2-24, Greg Phill Testimony.[36]) Mr. Phill testified that MISCA hired the attorney to express the group's displeasure because "[the coaches] did not want the boys and girls together [in the same season] and we felt that that would be detrimental to the sport." Fifty of the 250 schools offering swimming also complained, and the MHSAA moved the girls' swimming season back to the fall.[37] (Tr. Exh. 45 at 236.)

Plaintiffs argue that the winter season is more advantageous than fall for swimming. For one reason, Michigan boys are able to go straight from the high school swimming season to the club tournaments, whereas Michigan girls have a gap in competition because their season has ended in November. (Tr. at 505:4- 506:1, D. Lopiano.) Sectional and regional swim meets for U.S. Swimming take place in March.[38] (Tr. at 1202:7-12, G. Phill.)

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[36] Greg Phill, who testified on behalf of Defendant MHSAA, is a swim coach for Livonia Stevenson High School and for Clarenceville Swim Club, a U.S. Swimming program. (Tr. at 1175:23-1176:6, G. Phill.) He coaches the girls' team, has been at Livonia Stevenson for sixteen years, and has been coaching swimming for twenty-five years. (*Id.* at 1176:14-15.) He has also coached and continues to coach an Olympic swimmer, Sheila Taormina, who won a gold medal in 1996 in a relay event. (*Id.* at 1176:16-1177:12.)

[37] After Lower Peninsula girls' swimming was moved back to fall, the MHSAA sponsored a competitive cheerleading tournament for girls in the winter to add an athletic opportunity. (Tr. Exh. 52.)

[38] Mr. Phill testified, upon questioning by one of the MHSAA's attorneys, that in Michigan, the highest level of regular-season competition is found in high school swimming, as opposed to U.S. Swimming club-level swimming. (Tr. at 1192:8-12.) Presumably, this was in response to the fact that girls miss U.S. Swimming club competition because of the season in which they swim. This does not prove that missing U.S. Swimming competitions is not a detriment, however. Even if it is true that high school competition is higher level, girls who seek

The Phillips 66 national swim championships are in March/April of each year. (Tr. at 1202:13- 24, G. Phill; Tr. at 505:4-506:18, D. Lopiano.) In diving, junior nationals are in March, so girls face a gap in competition between the end of their fall interscholastic season and open amateur competition. (Tr. at 506:19-507:4., D. Lopiano.)[39]

Finally, the boys' swimming season is nearly two weeks longer than the girls' season, giving the boys a greater opportunity to practice and compete. (Tr. at 500:25-501:1, D.

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additional swimming opportunities through club participation are denied participation in this particular club program or in these particular competitions.

While girls' amateur participation opportunities are affected by missing amateur competitions, the Court finds that recruiting opportunities are not affected one way or the other. Collegiate recruiting is not dependent on seeing the swimmer, since "[b]asically swimming is a black and white sport. You're either this fast or you are not that fast, and that's what they look at. Most college recruiting is done from [an] office." (Tr. at 1190:18-1191:2, G. Phill.) In addition, girls would be able to rely on their final, senior year season performance to attempt to obtain a scholarship or the opportunity for a non-scholarship spot on a collegiate swim team.

[39] Plaintiffs' expert testified that this is particularly crucial because Michigan boys are able to do a single "taper," whereas Michigan girls must do a double "taper" to compete in the state championship in the fall and the national championships in the winter. (Tr. at 505:4-506:1, D. Lopiano.) A taper is designed to have a swimmer peak in time for a championship event. It involves intense training over a period of time, usually at the season's beginning, followed by a gradual decline in practice workload so that the swimmer can physically recover and can be primed to swim his or her fastest times. (*Id.* at 506:2-18.) It is extremely difficult to do tapers in close proximity to each other because of the time and physical exertion required. (*Id.* at 505:12-16.)

Michigan boys are able to focus on a single taper because the national tournaments are usually the week after the MHSAA state championship tournament. (Tr. at 505:16-506:1, D. Lopiano.) Michigan girls do not have that benefit because their high school season has concluded in late November. Michigan boys who dive are able to go straight from their winter season to the national open amateur tournament in March, whereas girls have a competition gap unless they are able to afford a private diving club and continue their training in preparation for the national tournaments. (*Id.* at 506:19-507:4.)

Lopiano; Tr. Exh. 63 (1998-99 MHSAA Quick Reference Calendar).)[40]

The MHSAA offered testimony on the reasons why the fall season could be considered superior or equal to the winter season for swimming. Mr. Phill said that high school swimming programs in Michigan are flourishing for girls, but declining for boys. (Tr. at 1184:22-1185:17, G. Phill.) He believes that this is because the fall season for girls allows them to transition from summer swimming and clubs to the high school program in the fall, but boys do not have the same incentive to return to winter high school competition after taking the fall season off. (*Id.*) There could well be other reasons for a decline in boys' programs, like the rise of other sports offered for boys in fall, particularly soccer, for example. In addition, Mr. Phill testified that he and other girls' swimming coaches feel that fall is superior to winter for the swimming season because there are not the distractions of the winter season, like exams, the winter break for the holidays, or spring break. (Tr. at 1181:12-17, G. Phill.)

The rest of the MHSAA's evidence about swimming centered on its assertion that participation opportunities for both girls and boys would decrease if both swam in the same season. Approximately one-third or more of Michigan's high school swimming coaches coach both girls' and boys' programs for their respective schools. (Tr. at 1188:22-1189:1, G. Phill.) Mr. Phill testified that coaches could not

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[40] One of Plaintiffs' experts argued that putting Lower Peninsula swimming and diving into the same season would allow teams to share travel, promotion, coaching, and facility rental time. In addition, she argued that they could swim mixed relay events together and have a swimming program even if there are not enough athletes for a single-sex team. There was simply no empirical evidence presented to enable the Court to make a finding on those assertions. However, the Court believes Plaintiffs' expert's assertion that there can be attendant psycho-social benefits when young males and females train and compete together, in certain circumstances. (*See* Tr. at 668:12-669:11, 706:20-709:17, L. Bunker.)

coach both teams at the same time. (*Id.* at 1189:2-24.) Clearly, this means that some unknown number of new coaches would have to be hired if boys and girls swam in the same season. There was no testimony regarding how difficult or easy hiring these coaches would be.

Joining the seasons would also cause a decline in club programs that rent pool space from schools. (Tr. at 1187:25-1188:4, G. Phill.) Presumably, this would only occur in the combined season, not in the season when no high school teams would be swimming.

Mr. Phill asserted that the dimensions of swimming pools to which he has been in states where boys and girls swim in the same season are often 50 meters by 25 yards. (Tr. at 1183:11-13.) There are no high school pools in Michigan with dimensions of that size. (Tr. at 1183:15-17, G. Phill.) There was no testimony regarding how well Upper Peninsula schools manage, in terms of having sufficient pool space, in offering swimming to both sexes in the winter. Mr. Phill further testified that at Livonia-Stevenson High School, where he coaches, the girls' "B" team would have to be eliminated if the seasons were joined.[41] (Tr. at 1186:13-20.)

F. Girls' Tennis

After reviewing the evidence, the Court finds that spring is the more advantageous playing season for tennis. In addition, the MHSAA presented no evidence that both sexes playing tennis in the same season would create logistical problems.

In 1999-2000, 8,759 girls played tennis for MHSAA member schools. (Tr. Exh. 99 at 42-43.) MHSAA schedules the girls' tennis state championship tournament in the fall. (Stip. Fact No. 36.) For 2001-02, MHSAA set the first practice date as August 13, the first contest date as anytime

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[41] Mr. Phill testified that the Livonia-Stevenson girls' team currently has sixty-four girls, whereas he expects the boys' team to have eighteen in this winter's season. (Tr. at 1183:18-24.)

after the first practice, and the end of the season as October 20. (Tr. Exh. 9(a) at 113.) These decisions place girls' tennis in the fall.

MHSAA schedules the boys' tennis state championship tournament in the spring, at the same time that the NCAA schedules women's and men's tennis. (Stip. Fact No. 35; Tr. Exh. 40 at 2.) For 2001-02, MHSAA set the first practice and contest dates for boys' tennis as March 11 and the end of the season as June 1. (Tr. Exh. 9(a) at 113.) This places the boys' tennis season in the spring. The traditional playing season for tennis is the spring. (Tr. at 497:11-13, D. Lopiano.)

Boys' high school tennis immediately precedes the United States Tennis Association (USTA) summer tennis tournament circuit, so boys have the advantage of high school practice, competition, and coaching before participating in the circuit and are better prepared for the summer circuit, where college coaches watch play. (Tr. at 508:4-509:3, D. Lopiano; Tr. at 700:21-701:13, L. Bunker.) In addition, the girls' high school tennis season is approximately 20 days shorter than boys' tennis. (Tr. at 500:20-24, D. Lopiano; Tr. Exh. 63.)[42]

IV. PSYCHOLOGICAL AND GENERALIZED HARMS TO MICHIGAN GIRLS

The current scheduling of seasons harms Michigan girls in a number of ways that can be generalized across all of the sports at issue in this case. First, the practice of scheduling only girls' sports, but not boys' sports, in disadvantageous and/or non-traditional seasons sends the clear message that female athletes are subordinate to their male counterparts,

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[42] Putting girls' and boys' tennis into the same season would allow teams to share travel, promotion, coaching, and facility rental time. They could play mixed doubles matches together and have a tennis program even if there are not enough athletes for a single-sex team. Moreover, there are psycho-social benefits from young males and females training and competing together. (Tr. at 668:12-669:11, 706:20-709:17, L. Bunker.)

and that girls' sports take a backseat to boys' sports in Michigan. (*See* Tr. Exh. 81 at 1.) It also deprives girls of contemporaneous role models, skills development, and team-building opportunities.

These scheduling practices also have a negative effect on the gender role socialization of Michigan's girls.[43] Treating boys and girls differently and inequitably in athletics can contribute to or cause girls and boys to have dramatically different perceptions of self-worth and to cause girls to have lower expectations for themselves. (*Id.* at 676:13-19.)

When girls are treated unequally as compared to boys, girls receive the psychological message that they are "second-class" or that their athletic role is of less value than that of boys. (Tr. at 494:9-556:1, D. Lopiano; Tr. at 673:3-15, 679:11-680:13, L. Bunker.) Being scheduled in a non-traditional season, or in a season that is clearly disadvantageous while boys are scheduled in the clearly advantageous season, gives girls this "second-class" status message. (Tr. at 638:25-639:6, B. Eveland; Tr. at 340:17-344:22, C. Erbe; Tr. at 450:19-451:5, J. Magelssen; Tr. at 137:2-137:11, C. Engel.)

This message stays with girls throughout adulthood and can extend to careers and interpersonal relationships. (Tr. at 673:16-674:12, L. Bunker.) When girls receive separate and unequal treatment, this teaches them to expect discrimination, so that they may not even recognize discrimination when it occurs. (*Id.* at 714:1-715:8.) In addition, girls may be wary of change because they do not know what to expect or fear that the situation could become even worse for them.[44] (*Id.* at 679:11-683:19, 715:9-21; *see also* Tr. Exh. 254.[45])

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[43] Gender role socialization is the psychological term used to explain how an individual learns what is expected of him or her based on his or her sex. (Tr. at 665:24-666:03, L. Bunker.)

[44] Dr. Bunker examined a study conducted by the Office for Sex Equity and Education of the Michigan State Department of Education on

Differential and unequal treatment of boys and girls in the scheduling of seasons can psychologically affect girls in negative ways. (Tr. at 679:11- 680:13, L. Bunker.) If girls recognize that boys always play in the traditional seasons while girls play in the non-traditional seasons, coupled with other unequal treatment such as prime time game scheduling, girls may develop unhealthy coping mechanisms to rationalize away the unfair treatment. (*Id.* at 680:2-13.)

One of these mechanisms might be to establish lower expectations. That is, a girl will recognize she is being discriminated against but expect that this will continue for the rest of her life and assume she must adjust to the

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the perception of boys and girls and their interactions in the school environment. (Tr. at 670:10-20, L. Bunker; Tr. Exh. 105 (4/92 Report: "The Influence of Gender-Role Socialization on Student Perceptions").) While the Court gives this study very little weight in its consideration of the evidence, it is interesting to note that the results of this study done in Michigan tend to confirm the expert opinions of Dr. Bunker.

This study asked Michigan high school boys and girls to imagine their reaction if they woke up the next morning as a member of the opposite sex. (Tr. at 671:4-8, L. Bunker.) Twenty-two percent of the female respondents indicated that they had at some point wanted to change gender. (Tr. Exh. 105 at 3, 11-12; Tr. at 671:8-11, L. Bunker.)

In contrast, only three percent of the male respondents said they had ever considered wanting to be a girl. (Tr. Exh. 105 at 3.) "More than any other item," girls who wanted to change gender believed they would receive better athletic opportunities. (Tr. Exh. 105 at 11-12; Tr. at 671:8-11, L. Bunker.) Boys, on the other hand, perceived that if they were a girl they would receive second-class treatment. (Tr. at 676:17-19, L. Bunker.)

[45] In a survey conducted by Western Michigan University and commissioned by the MHSAA for this lawsuit, girls who were asked to comment on the possibility of changing their sports seasons indicated some concern that if seasons changed or combined with boys' seasons, girls would end up with worse practice or playing times or other disadvantages. For example, one girl said, "... Putting sports like basketball or tennis into the same season for both boys and girls is probably a disadvantage to the girls. This is because many schools will treat the girls teams as if they aren't important. The girls will not get as good practice or coaching in many cases." (Tr. Exh. 254 at 43.)

discrimination rather than seek to change it. (Tr. at 680:17-22, L. Bunker.)

For example, Kristi Madsen, a former high school athlete, testified that she felt that it "hurts" girls' self-esteem "[w]hen you look to your counterparts, the males, and they are playing in the right seasons, they get all the benefits that come along playing in the right season, and then you look at where you are, I think it hurts [self-esteem]." (Tr. at 109:8-17, Kristi Madsen; Tr. at 16:7-17:10, D. Madsen (testifying that her daughter believed that she has to be "good enough to play on a boys' team" in order to receive equal benefits in athletics).)

Discriminatory treatment of girls also has an effect on boys. Boys receive the message that girls are inferior and are harmed by that message. (Tr. at 135:24-137:16, 141:18-142:2, Connie Engel[46] Testimony; Tr. at 671:22-25, L. Bunker.) As parent Connie Engel said, "This is creating a situation where [my son] believes that girls are second-class .... My children, my son and my daughters, don't get to experience [basketball's "March Madness"] together and they know that they are treated differently." (Tr. at 137:2-137:11, C. Engel.)

In addition, there are other harms, which could seem minor to some, but in the aggregate act to reinforce the inconvenience and unfairness of playing in a disadvantageous season. For example, girls playing sports outside of their traditional seasons have difficulties obtaining current season equipment for the sport. (Tr. at 35:7-37:11, D. Madsen; Tr. at 97:5-17, Kristi Madsen Testimony; Tr. at 114:6-17, Kelsey Madsen Testimony; Tr. at 494:9-556:1, D. Lopiano.) Girls also have diminished

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[46] Connie Engel is the mother of three children, two daughters and one son, who attended or currently attend Forest Hills Central High School and who all participated in or currently participate in interscholastic athletics there. (Tr. at 126:17-127:12, C. Engel.) She is also a founding member of CFE. (*Id.* at 134:19-20.)

opportunities for recognition in national athletic publicity and rankings, like USA Today's weekly Top 25 high school rankings, or all-America honors, like from Parade All-America or McDonald's All-American teams. (Tr. at 494:9-556:1, D. Lopiano.) In addition, Michigan girls are denied the experience of participating in promotional events like basketball's "March Madness," national shootouts, three-on-three tournaments, and similar competitions. (*Id.*)

Furthermore, Michigan's seasons differ from a majority of other states, or many other states, depending on the sport. Girls transferring in or out of Michigan schools mid-year can be prevented from playing a season of interscholastic athletics because they have missed the season. Playing out of a traditional season also limits one's choice of opponents, as well, including the ability to play teams in neighboring states. In addition, girls who end up playing in college must adjust to different collegiate seasons. (Tr. at 712:20-713:10, L. Bunker.)

Because the MHSAA schedules some girls' sports, *but no boys' sports*, in non-traditional seasons, girls, *but not boys*, must choose among sports they already play when they enter high school. (Tr. at 32:9-34, D. Madsen.) For example, girls who play sports in community recreation programs before high school often play with boys in the same, traditional and/or more advantageous seasons. (*Id.*) But when girls enter high school, they must choose between sports when some of those sports are scheduled in different seasons and create conflicts, and boys do not face this choice. (*Id.*)

Finally, participation opportunities for girls in the winter are limited, perhaps as a result of this scheduling. The MHSAA schedules five sports for boys in the winter, basketball, wrestling, ice hockey, skiing, and swimming and diving. (Tr. Exh. 63.) Three winter sports are scheduled for girls: volleyball, gymnastics, and skiing. Very few MHSAA member schools have girls' gymnastics or skiing teams, (Tr. Exh. 99), so most Michigan girls have the opportunity to

participate in one winter sport, whereas boys would have three or four, depending on the availability of boys' skiing and ice hockey. "The vast majority of Michigan high schools conduct only one sport for girls in the winter. Fewer than 20% sponsor two sports. Fewer than 2% sponsor three sports. The addition of girls swimming in the winter schedule at more than 200 schools fills a desperate need for many MHSAA member schools and their female athletes." (Tr. Exh. 44 (Editorial by MHSAA executive director John E. Roberts, 1990-91 MHSAA Bulletin).) Girls' swimming was later moved back to fall, however.

V. DEFENDANT MHSAA'S JUSTIFICATIONS FOR CURRENT SEASONS

The MHSAA has argued that the girls' sports at issue in this lawsuit are scheduled in superior or equal playing seasons. This is an argument that this Court wholly rejects after reviewing the facts presented at trial for the reasons described in the previous sections.

In addition, the MHSAA has presented a set of justifications for scheduling girls' seasons as it has that fall into the categories of available facilities, coaches and officials, i.e., concerns that logistical limitations require putting the sexes in separate seasons in order to maximize participation slots in every sport. These concerns, while legitimate, would at most permit the MHSAA to schedule girls' and boys' teams in separate seasons, but the two sexes would have to split advantageous and disadvantageous sports equally. It is clearly not equitable for girls to play in all of the disadvantageous seasons and for boys to play in none of them. Nonetheless, for reasons discussed both in the previous section and in this section, Defendant MHSAA presented insufficient evidence in all of the sports at issue that logistical concerns could not be resolved if both sexes played in the same season.

Finally, the MHSAA presented arguments that absolutely do not legally justify providing Michigan girls

with different and unequal treatment. These arguments were that Michigan girls prefer seasons as they are, which, among other problems, the Court found to be a dubious conclusion; that member schools prefer the current seasons; and that girls' programs need an "independent identity" from boys' programs, which is allegedly provided by putting girls in a different season. These are discussed below.

A. Logistical Concerns

1. Facilities

Ensuring the greatest number of participation opportunities for children in interscholastic sports is a legally legitimate goal, as well as wise policy. To this end, being able to sponsor freshman and junior varsity teams, larger squads, and maximum playing time for the most young people are also legally legitimate goals. (*See* Tr. Exh. 106.) Nonetheless, the Court is not convinced that the MHSAA's scheduling system maximizes participation or is the only method by which to maximize participation because insufficient evidence on these points was presented. Moreover, the Court finds that administrative convenience against a historical background of treating girls' athletics inequitably, and not actual empirical evidence, is a major cause of existing scheduling.

The MHSAA argues that it cannot schedule basketball, soccer and swimming concurrently for boys and girls because there are insufficient gymnasiums, soccer fields and pools in Michigan. (Tr. at 1139:18-19, T. Miller Testimony; Tr. at 1183:1-17, G. Phill; Tr. at 799:11-23, K. McGee.) To combine seasons in some or all separately-scheduled sports, the MHSAA argues, would have the effect of reducing participation opportunities for both boys and girls by forcing schools to cut team size or cut freshman or junior varsity teams.

However, considering that the MHSAA bore the burden of production and persuasion on this point, the evidence presented was insufficient to convince the Court. The evidence was almost exclusively anecdotal. For instance,

the MHSAA did not present enough evidence at trial to demonstrate how many schools have inadequate facilities to allow girls and boys to swim or play soccer in the same season. In terms of pool space, thirty of the forty-three states sponsoring boys' and girls' swimming schedule the seasons concurrently. (Tr. at 1200:18-22, G. Phill; Tr. Exh. 256; Tr. Exh. 62.) The boys' and girls' swimming teams in Michigan's Upper Peninsula also swim in the same season. (Stip. Fact No. 47.) In addition to boys' teams, MHSAA member schools accommodate other teams in the winter by renting their pools to swimming club teams. (Tr. at 1187:21-1188:4, G. Phill.) Even assuming that Mr. Phill's assertion that the size of the Livonia-Stevenson pool would force him to cut participation on the Livonia-Stevenson girls' team is true, that says nothing about what alternatives have been considered, like community pools, or what the situation is in the rest of the state.

In terms of soccer field space, thirty-seven of the forty-eight states sponsoring boys' and girls' high school soccer schedule the seasons concurrently. (Tr. at 1162:16-20, T. Miller; Tr. Exh. 256 (1999-2000 National Federation Sport Season Survey).) Moreover, soccer fields in Michigan are now being used concurrently by boys and girls because girls' club teams are playing in the fall (when boys' high school teams are playing) and boys' club teams are playing in the spring (when girls' high school teams are playing). (Tr. at 1164:24-25, T. Miller.) The soccer situation is similarly unclear to this Court to make a finding that logistical problems would exist in the event that girls and boys played in the same season.

Assertions have been made that some schools may have difficulties accommodating both girls and boys in the same season in swimming and/or soccer, but it does not suggest to what extent this would be a problem. More importantly, there was no indication whether any facility alternatives are possible and have been considered, or if the position that facilities are simply inadequate to accommodate girls and

boys at the same time throughout Michigan has been adopted without further study because that is the conventional wisdom.

The MHSAA did not present any evidence that boys and girls cannot play tennis or golf in the same season. Moreover, there was evidence at trial, which the MHSAA did not refute, that girls and boys can play basketball in the same season with little difficulty, if any, if girls' volleyball is moved to the fall season.

In terms of gymnasium space, a school with a single gym can accommodate boys' and girls' basketball teams practicing and playing concurrently. (Tr. at 459:22-460:12, J. Magelssen (testifying that most Michigan schools in Classes A, B, C and D have one gym that accommodates various indoor sports simultaneously); Tr. at 941:1-8, James Glazier[47] Testimony (testifying that there would be no problem at his current school and previous school if volleyball and girls' basketball facilities were switched).) For instance, Michigan high school gyms already have boys' basketball and girls' volleyball teams practicing and playing concurrently.

Practice times can be alternated weekly or each season so that boys practice right after school one week or season and the girls practice right after school the next. (Tr. at 517:20-25, D. Lopiano.) Boys' and girls' basketball games can likewise be played in the same season through "normal scheduling mechanisms" used in the 48 states in which boys and girls play basketball at the same time. (*Id.* at 517:17-518:11.) For example, boys' and girls' games can be scheduled so that one team or the other is playing at home, or they can play doubleheaders and flip-flop times in a doubleheader so that girls and boys have an equal opportunity for prime time. (*Id.*) Girls' basketball teams

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[47] Mr. Glazier is former athletic director at Grandville High School and is currently assistant principal at Caledonia High School. (Tr. at 916:6-12, J. Glazier.)

currently do not have to share gym space with volleyball or boys' basketball teams. But "having the gym to yourself [is not] a justifiable reason for treating boys different from girls." (Tr. at 833:15- 834:4, K. McGee.) In addition, playing in the fall, with no other teams needing gym space then, has not given at least some girls' basketball teams the ability to play games on Friday nights, since boys' football plays that night. (Tr. at 93:16-94:9, Kristi Madsen.)

It is true as the MHSAA points out that if girls' volleyball and basketball were switched, and girls' volleyball players had increased opportunity to play club volleyball, they would have to make a choice between club volleyball and high school basketball. (Tr. at 1050:25-1051:9, 1062:14-1063:4, P. Wilson.) Nonetheless, this is a choice for a young woman and her family to make, not the MHSAA. Girls are entitled to equal opportunities to be able to make these choices.

The MHSAA points to the high ranking of Michigan among the states for numbers of boys and girls participating in various sports as evidence that the current scheduling of seasons maximizes participation opportunities and argues that scheduling is the reason why participation numbers are what they currently are. (*See* Tr. Exh. 219 (1999-00 National Federation Sports Participation Survey).) The argument is that other states, who in many sports schedule both sexes in the same season or schedule girls in a different season than Michigan does, have lower participation numbers than Michigan because those states' scheduling creates problems that decrease participation opportunities for students. This is circumstantial evidence that simply proves little, in that the comparison between Michigan's participation numbers and other states' participation numbers is not apt.

First, one would expect Michigan to rank at least eighth in the nation in numbers of participants in each sport, since Michigan has the eighth highest population in the country. *See* 1999-2000 Census. So ranking among the top ten states

in a sport's participation numbers is not particularly instructive. Even where Michigan ranks higher than eighth, there are an unlimited number of other factors that influence participation numbers besides seasons, like school funding in general and athletic program funding in particular, the number of schools in a state sponsoring a particular sport, cultural attitudes in a state, the influence of weather on outside sports, etc. Without more, the Court cannot draw the conclusions from this data that the MHSAA asks be drawn.

2. Officials and Coaches

The MHSAA argues that it cannot schedule soccer and swimming for boys and girls concurrently because there are insufficient numbers of coaches in Michigan. (*Id.* at 1139:20-23, T. Miller; Tr. at 1189:14-24, G. Phill.) Similarly, the empirical evidence on this point was too sparse to make a finding that this is true. The circumstantial evidence that logistical problems could be resolved or would not exist in the first place was just as strong.

The MHSAA further argues that it cannot schedule soccer for boys and girls concurrently because there are insufficient numbers of officials in Michigan. (Tr. at 1140:8-13, T. Miller.) There are no special qualifications to officiate soccer matches between MHSAA member schools. A prospective official need only register with the MHSAA, which involves passing an open-book examination on MHSAA's rules and regulations, and pay a registration fee to the MHSAA. (Tr. at 1158:17-20, T. Miller.) The MHSAA asserted, but did not demonstrate, that some schools could have trouble finding "qualified" MHSAA-registered game officials, but there was little evidence that MHSAA-registered game officials would be unqualified if more were needed in a single season or if the existing officials were needed for more games during a single season.[48]

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[48] In addition, Ms. Norman-Nakamura, who testified on behalf of Plaintiffs, agreed on cross-examination that she is aware that some

Thirty-seven states, as well as Upper Peninsula schools, are able to schedule boys' and girls' soccer concurrently. (Tr. Exh. 256; Stip Fact No. 47.) Presumably, the Upper Peninsula[49] and those other states have enough officials and coaches. Thirty states are able to schedule boys' and girls' swimming concurrently and presumably provide an adequate number of coaches. Upper Peninsula schools likewise have boys and girls swim in the same season with a presumably adequate number of coaches. (Stip. Fact No. 47.)[50]

B. Michigan Girls Prefer the Current Seasons

The MHSAA asserts that, based on a survey that it commissioned Western Michigan University's Evaluation Center to conduct after this lawsuit was filed, Michigan girls prefer to play in the current seasons. (Tr. at 1014:22-1016:9, 1020:21-23, Daniel Stufflebeam[51] Testimony; Tr. Exh. 254 (4/15/99 Sports Seasons Survey Final Report).) The Court reads the results of that survey differently than the MHSAA does, as discussed below. Moreover, the Court

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volleyball coaches oppose changing the girls' season because they believe that volleyball officials would not be as available during the fall season when college teams compete. (Tr. at 278-283, B. Norman-Nakamura.) However, the MHSAA did not offer the testimony of coaches holding these beliefs, nor any other evidence to support this claim.

[49] Clearly, the Upper Peninsula has a much smaller population than most states and the Lower Peninsula of Michigan, but the Upper Peninsula's experience is comparable in that while the number of teams, and thus the number of officials and coaches needed, would be smaller, so would the total population from which those officials and coaches could be drawn.

[50] Moreover, there was only some discussion of whether it would be possible for boys and girls to be coached by the same individual and/or practice together to save resources like coaches and facility usage. If such an arrangement were logistically possible and outweighed other disadvantages, Plaintiffs' experts also testified that there is psycho-social benefit to boys and girls training together where appropriate.

[51] Dr. Daniel Stufflebeam is director of the Evaluation Center at Western Michigan University, which conducted the survey for the MHSAA. (Tr. at 986:13-17, 998:21-999:9, D. Stufflebeam.)

notes that while a number of accomplished high school and college student-athletes testified about the disadvantages of the current seasons, the MHSAA did not offer the testimony of any girl or parent who was in favor of keeping the current seasons.

In addition, the survey suffers from design flaws and bias, some of which the Court will review here. Dr. Stufflebeam testified that the survey form listed potential negative consequences of moving the girls' seasons at issue in this case and asked girls how objectionable they found those consequences. (Tr. at 1036:11-1037:6, D. Stufflebeam; Tr. Exh. 254 at 18.) No benefits of changing the seasons were presented to the surveyed girls. (*See* Tr. Exh. 254.) Further, Dr. Stufflebeam testified that the potential negative consequences identified in the survey were provided by the MHSAA's attorneys. (*Id.* at 1037:7-1038:23.) No consultation was done with Plaintiffs' attorneys for suggestions of positive benefits to changing seasons to ask girls about in the survey, nor was any independent analysis conducted to determine the potential benefits and detriments of moving any seasons. This was likely because of the time pressures involved in conducting this survey under the parameters placed on the Evaluation Center by the MHSAA's attorneys, based on when it was needed for this litigation. (*Id.* at 1020:21-1023:23, 1031:7-20.)

Sixty of MHSAA's 729 member schools participated in the student survey. (Tr. at 1026:6-13, D. Stufflebeam.) Only one-third of the girls in these 60 schools were surveyed, and nearly one-third of respondents participated in sports that are not played in disadvantageous seasons. (*Id* at 1026:6-13, 1029:3-6.)

In addition, the original, written survey responses were destroyed after the data from them was entered into a database, but before Plaintiffs or their expert could review them. (Tr. at 1029:16-1030:5, D. Stufflebeam.) Thus, it is impossible to tell what subjective answers where girls could write comments match to what objective responses to the

objective questions, and therefore, it is impossible to ascertain why girls with certain opinions may have held those opinions.

Even setting aside these flaws, the Court is not at all convinced that the survey results themselves support the MHSAA's position that Michigan girls largely prefer current scheduling. In responding to the question of whether "all high school sports seasons should be the same as college," for example, 31.4 percent of the respondents said no, 31.3 percent said yes, and over 37 percent had no opinion. (Tr. at 1030:13-22, D. Stufflebeam; Tr. Exh. 254 at 26.) This is hardly overwhelming support for maintaining current, non-traditional seasons employed by most of the girls' seasons at issue in this lawsuit.

Moreover, some of the survey responses of the female athletes that indicated that some of those who opposed changing seasons did so because they feared boys would receive better treatment and practice times if the girls moved to the same playing seasons as boys. (Tr. Exh. 254 at 39 *et seq.*; Tr. at 1031:7-1035:9, D. Stufflebeam.) If girls and boys play a sport in the same season, however, individual schools are under legal obligation to give girls and boys equal treatment in practice and game times, for example.

In addition, the Court has some concern that girls would indicate a desire not to change simply in order to avoid being branded troublemakers or because they have come to believe that an inequitable situation is their lot in life. For example, one respondent said, "I think sports seasons are good the way they are—I would like girls' sports to be a bigger deal, but I don't want to put up a stink." (Tr. Exh. 254 at 43.) In sum, the collection of opinions of girls presented from the WMU Survey does not show that the current seasons are equitable or even that Michigan girls believe that they are equitable.

C. Member Schools Prefer the Current Seasons

The MHSAA argues that the majority of member schools, most recently in 1998, have indicated that they

prefer the current seasons. (Tr. Exh. 39 (1998 Survey Form); Tr. Exh. 229 (1973, 1979, 1981, 1985 & 1994 School Surveys).) The Court notes first that if, after applying the facts to the law, the seasons as they have been currently set by the MHSAA violate the law, they violate the law regardless of the preferences of the member schools.

To the extent that the Court has considered preferences of the member schools, as the Court could ascertain those through the available evidence, it has only been in the context of assuming that member schools may have had actual non-discriminatory reasons based on empirical facts for preferring certain seasons for certain sports over others.

It is also possible, however, that school representatives may prefer seasons the way they are simply for administrative convenience, since school representatives have a great deal else to do every day besides consider this one issue. The Court has also considered this possibility and has thus given very little weight, if any, to the member schools' preferences, as expressed on the MHSAA surveys, as an indication of whether the current sports seasons are legally equitable. A comprehensive study of the possibilities of changing seasons, as well as the advantages and disadvantages of various seasons, should have been the task of the MHSAA. The Court has instead relied much more heavily on the facts presented in this litigation regarding the benefits and disadvantages of different seasons for different sports.

In addition, the form of the MHSAA's surveys over the years made them of very little use to this Court. For example, the MHSAA prepared two draft survey forms for its 1998 survey. (*See* Tr. Exh. 40.) One form asked the schools for their position on each separate sport (so that a school could indicate whether, for instance, it would favor moving basketball and volleyball but not swimming). The second form, which MHSAA actually sent the schools, asked the schools for their position on whether all sports should be moved with no option to vote in favor of moving certain

sports but not others. (*Id.* at 2.) The straight, "up or down" vote approach, which is the one that was used, has obvious limitations, since there are a number of ways in which seasons scheduling could be changed. In addition, the survey form used provided information only on potential coaching conflicts based on current coaching arrangements, but does not provide any other information as to whether additional coaches could be hired. (*Id.*) Finally, the survey provided no look at schools' other reasons for desiring the status quo. (*Id.*)

Finally, the MHSAA has placed sports seasons without regard to survey results or moved sports seasons without first surveying member schools, including boys' golf, girls' soccer and girls' swimming. (Tr. Exh. 29 at 2; Tr. Exh. 10(d) at 5; Tr. Exh. 81 at 1.) More member schools (sixty) voted to schedule the soccer seasons separately than those who wanted the seasons together (eighteen), but most schools expressed no preference (507) or otherwise did not vote on this issue or at all. (Tr. Exh. 229 (1981 Survey—Soccer).) After the MHSAA placed both soccer seasons together in the fall, several school administrators complained, and girls' soccer was moved to spring. (Tr. Exh. 47 at 3; Tr. Exh. 10(d) at 5.) The MHSAA originally placed girls' basketball in the fall even though girls' basketball coaches and many schools originally wanted to stay in winter, where it was before it was sanctioned by the MHSAA, and ignored the initial vote of girls' basketball coaches to move the season back to winter. (Tr. Exh. 78.) The MHSAA unilaterally moved girls' swimming in 1990- 91 from fall to winter "as a matter of fairness, a matter of trying to do the most good for the most number of girls," before it was moved back to fall. (Tr. Exh. 44.)

D. Giving Girls an "Independent Identity"

The MHSAA asserted at trial that playing basketball in the fall rather than the traditional winter season benefits girls because they do not have to compete with boys' basketball for attention of many kinds, and thus receive

increased recruiting opportunities and media coverage. (*See* Tr. at 794:3-22, 796:14-16, K. McGee.) Ms. McGee, the MHSAA witness who offered the assertion, said she felt that putting girls in a separate basketball season demonstrated that girls could bring fans out to their games and be successful in basketball without a contemporaneous companion boys' team in the same season. (*Id.* at 794:3-17.) But Ms. McGee also acknowledged that it is true that if MHSAA moved the girls' basketball season to the winter, Michigan girls would be placed on an "equal footing" with Michigan boys and girls in the rest of the country. (*Id.* at 851:18-852:4.)

The concept of having an "independent identity" is also based on the premise that boys will "overshadow" girls in fan support and media coverage if boys and girls play basketball in the same season. (Tr. at 829:23-830:1, 846:3-7, 849:4-850:6, K. McGee.) This conflicts with giving girls a separate season so they can prove that their program stands on its own. With all due respect to Ms. McGee, who obviously cares a great deal about coaching and the girls that she coaches and only wants the best for female players, the Court finds that separate basketball seasons sends a message that the girls' basketball programs cannot be "fitted in" to the "regular" basketball season of winter. Girls' basketball programs, however, are just as important as boys' programs, and girls deserve to play in the "regular" season, too.

In addition, to achieve this "independence," girls, among other things, play basketball on two school nights because "football is on Friday nights" in the fall. (Tr. at 825:24-828:11. K. McGee.) The winter season makes it feasible for boys to play basketball on Tuesdays and Fridays. (*Cf.* Tr. at 94:2-6, Kristi Madsen.)

Ms. McGee's assertion that girls' basketball in the fall receives more media coverage than boys' football in the fall is based on girls playing twice a week, and therefore receiving post-game coverage twice a week, and boys

playing football once a week, and therefore receiving post-game coverage once a week. (Tr. at 832:9-25, K. McGee.) Ms. McGee, however, provided no documentation supporting her assertion that girls receive more media coverage in the fall compared to boys' football. (*Id.*) In addition, Ms. McGee coaches one of the most successful girls' basketball programs in Michigan. Other girls' basketball programs may very well not receive the same quantity and quality of media coverage that Flint Powers' program does, even if playing in the fall season has some effect on the quality and quantity of media coverage received generally.

Moreover, Dr. Linda Bunker testified that if girls were in fact to receive less media coverage compared to boys by playing basketball in the winter, it is better preparation for adulthood for girls to recognize this and decide for themselves how they will handle situations that they view as inequitable. (Tr. at 738:10-25, L. Bunker.) If girls "ha[ve] the opportunity to visually see they are not being given the same amount of press coverage, then they have an opportunity to do something about it, whether it's they or the newspapers or the parents or the community, have a chance head on to address the issue of inequities." (*Id.*)

CONCLUSIONS OF LAW

I. PLAINTIFFS' FOURTEENTH AMENDMENT CLAIM

A. Defendant MHSAA is a State Actor

The Fourteenth Amendment to the United States Constitution provides, "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. To be liable under 42 U.S.C. § 1983 for violating the Fourteenth Amendment, an entity such as Defendant must be considered a "state actor."

The United States Supreme Court found recently that another state's high school athletic association, the Tennessee Secondary School Athletic Association (TSSAA), was a "state actor" after considering facts regarding the TSSAA's make-up and role in the administration of high school athletics in Tennessee. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 121 S. Ct. 924, 148 L.Ed.2d 807 (2001). The Supreme Court noted that, "The nominally private character of the [TSSAA] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it." *Id.* at 298, 121 S. Ct. 924. Among the facts that the Supreme Court found relevant to reaching this determination were a TSSAA membership of predominantly public schools; revenue coming from membership dues and gate receipts from tournaments held at member schools; state officials given *ex officio* status on the legislative council; and eligibility of TSSAA employees for the state employees retirement system. *Id.* at 298-300, 121 S. Ct. 924. The Supreme Court noted that a mechanism is required to implement interscholastic sports schedules and competition rules governing Tennessee's schools, and that mechanism took the form of public school officials acting together under the auspices of the TSSAA. *Id.* at 299, 121 S. Ct. 924.

When the Sixth Circuit held that the TSSAA was not a state actor, the MHSAA was adamant that it was very similar in structure to the TSSAA. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 180 F.3d 758 (6th Cir.1999); (Supplementary Motion by Defendant MHSAA, 9/1/99, Dkt. No. 183; Renewed Motion by Individual Defendants, 9/1/99, Dkt. No. 182 ("the nature and function of the MHSAA is virtually *identical* to that of the TSSAA") (emphasis added).) This Court, however, felt that other decisions of the Supreme Court and other federal circuits necessitated the conclusion that the TSSAA was a

state actor. *Communities for Equity*, 80 F.Supp 2d at 738. Thus, there was still an open factual question for trial whether the MHSAA was a state actor, even though based on the facts presented at that time, this Court agreed with the MHSAA that it was nearly identical to the TSSAA. *Id.*; (Order, 8/31/01, Dkt. No. 452.)

The Supreme Court eventually reversed the Sixth Circuit, finding that the factual inquiry proved the TSSAA to be a state actor. *Brentwood Academy*, 531 U.S. at 298, 121 S. Ct. 924. Similarly, this Court finds that the facts presented at trial clearly necessitate a finding that the MHSAA is a state actor.

The purpose of the MHSAA—to create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state—is virtually the same as its Tennessee counterpart. The MHSAA has a membership of predominantly public schools and almost every eligible public school belongs. Its revenue is derived from gate receipts from tournaments held at member schools and broadcast fees, among other items, revenues to which schools would otherwise be entitled. The membership of the MHSAA's Representative Council includes a representative of the state superintendent of education and is comprised of mostly public school employees acting as representatives for their schools. Some MHSAA employees continue to be eligible for participation in the state employee retirement system. Moreover, the MHSAA exercises adjudicative power over the schools with its ability to investigate and determine rules violations and resultant sanctions.

Just as the Supreme Court recognized that a mechanism is required to implement interscholastic sports schedules and competition rules governing Tennessee's schools, that mechanism in the State of Michigan takes the form of public school officials acting together under the auspices of the MHSAA. This is clearly correct and strongly supported by the evidence presented in this case. For example, Ms. McGee, now a member of the Representative Council, said,

"[I]t would be chaos" with "a system of high school sports where there is not a level playing field ... by when [schools] compete against each other." (Tr. at 869:8-14.) In addition, the MHSAA's own position paper on school choice notes that,

> Over the years, responsibility for regulating interscholastic athletics changed hands and organizations changed names, but always there have been provisions for statewide governance of interscholastic athletics. The MHSAA has been the serving and controlling organization for 67 years .... [T]he need for coordination of rules between districts [in non-athletic activities] has never risen to a level that a statewide regulatory body has been created to enforce a statewide code of rules and penalties [like in athletics].

(Tr. Exh. 22 at 3.) Finally, the MHSAA's developmental history is evidence of the fact that the State of Michigan felt that such a body was needed. Its legal status and official designation may have changed over the years, but as this Court has said before, the crucial question of its relationship with Michigan schools has not.

Being found to be a "state actor" is not a punishment, as Defendant suggests. (*See* Defendant's Proposed Findings of Fact and Conclusions of Law, 10/24/01, Dkt. No. 515 ("How long must the MHSAA pay for its historical relationship with the State that was ended through the legislative process in 1971?").) To the extent that it is a burden to ensure compliance with the Fourteenth Amendment to the United States Constitution, it is the honorable burden and duty of all entities and individuals acting with the power entrusted to them by their fellow citizens to ensure that they treat all American citizens fairly and with due regard for their rights. The role that the MHSAA has assumed, and particularly the power that it has been given to fulfill that role, leaves this Court with the firm conclusion that

"there is no substantial reason to claim unfairness in applying constitutional standards to it." *See Brentwood Academy*, 531 U.S. at 298, 121 S. Ct. 924.

B. Michigan Girls Have Been Denied Equal Protection By Current Seasons

To state a Fourteenth Amendment claim, Plaintiffs must also allege that Defendant treats high school boys differently from girls. *See United States v. Virginia*, 518 U.S. 515, 532-33, 116 S. Ct. 2264, 135 L.Ed.2d 735 (1996). Once Plaintiffs have established a gender classification, the burden of justifying the classification shifts to Defendant, and the justification must be "exceedingly persuasive." *Id.* Defendant

> must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Id. at 533, 116 S. Ct. 2264 (citations omitted). It is undisputed that Defendant intentionally treats boys and girls differently by scheduling their interscholastic sports seasons at different times of the year. Girls are treated differently from boys in two ways. First, some of the sports that girls are offered that are the same as offered to boys, e.g., basketball and golf, are played in a different season than the boys play. Second, volleyball, the only sport at issue with only a girls' team, is played in a season different from the "traditional" volleyball season, whereas no sport with only a boys' team, e.g., football or wrestling, is offered in a "non-traditional" season.

Thus, the remaining question for this Court to decide is whether Defendant meets its burden of establishing an "exceedingly persuasive" justification for treating girls and boys differently. In other words, this Court must determine if Defendant's classification of boys and girls via their sports teams' placement in the current seasons "serves important governmental objectives," and the chosen scheduling is "substantially related to the achievement of those objectives." *See id.* at 533, 116 S. Ct. 2264. The Supreme Court, while discussing the "exceedingly persuasive" standard for sufficient justification, noted that its current direction in cases of classification by gender focused on the differential treatment or denial of opportunity for which relief is sought. *Id.* at 532-33, 116 S. Ct. 2264.

Animus on the part of Defendant is not required for a finding of a Fourteenth Amendment violation where a rule or classification treats males differently from females on its face. Here, the classification of the MHSAA mandates that, for example, boys will play tennis in the spring, but girls will play tennis in the fall. That is a classification that on its face treats boys and girls differently. In another case involving a sex classification, *United States v. Virginia*, Virginia was found to have denied women equal educational opportunity on the basis of sex by refusing to allow any woman to attend Virginia Military Institute (VMI). *See* 518 U.S. at 530-534, 116 S. Ct. 2264 (citing other cases of facial classification by sex creating unlawful discrimination, like *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L.Ed.2d 225 (1971) (holding unconstitutional an Idaho law requiring that when several persons are equally entitled to administer a decedent's estate, males must be preferred to females); *Stanton v. Stanton*, 421 U.S. 7, 95 S. Ct. 1373, 43 L.Ed.2d 688 (1975) (holding unconstitutional a Utah law that parents support male children until age 21, but support female children only until age 18)).

Virginia was not, however, found to have displayed animus toward women in excluding them from VMI. 518

U.S. at 532-34, 116 S. Ct. 2264. Such a finding must be made in cases of discrimination shown through disparate impact, where a rule or classification treats males and females the same by its terms, but the effect of the law is different on males and females. In those cases, intentional discrimination must be proven by showing that the body adopting the law or classification did so with the intent of discriminating against one sex or other protected group, i.e. some kind of animus. *Washington v. Davis*, 426 U.S. 229, 241-242, 96 S. Ct. 2040, 48 L.Ed.2d 597 (1976) (where the District of Columbia required all police officer applicants to pass exam, and fewer black applicants passed than white applicants, test did not deny equal protection unless exam was used for invidious, discriminatory purposes instead of legitimate purposes). For example, where the Kentucky High School Athletic Association had a rule requiring that 25 percent of its member schools indicate a willingness to sanction a new sport before that sport would be sanctioned, female athletes claimed that the rule disproportionately served to deny them sports opportunities. *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 269 (6th Cir.1994) (*Horner I*). Because the rule did not treat females differently from males in its requirements, the athletes had the burden of proving intentional discrimination by showing that the *facially neutral* "25 percent rule" was adopted for the purpose of denying them opportunities, and not for a legitimate purpose. *Id.* at 272.

It is common sense that it is not necessary to find animus, i.e., a discriminatory purpose, for a Fourteenth Amendment violation to be present in the case of a classification that on its face differentiates between males and females. If a class of persons is treated differently because of an immutable characteristic like sex, and that different treatment harms that class of persons for reasons not justified by an "exceedingly persuasive" justification, the affected class of persons is no more or less harmed by the unjustified discriminatory treatment merely because

Defendant does or does not have animus toward them. A Fourteenth Amendment violation can exist even if it was perpetrated by those who believe that they have honorable intentions.

Therefore, motive plays only a limited role in the case before this Court. If the scheduling of seasons harms female athletes, Plaintiffs need not prove that Defendant MHSAA scheduled male and female seasons differently with invidious intent to harm female athletes. But the MHSAA's "benign" justifications for different treatment are not to be accepted automatically, since tenable justifications must describe actual purposes of Defendant, not rationalizations for actions that were, in fact, differently grounded. *See Virginia*, 518 U.S. at 536-37, 116 S. Ct. 2264 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 & n. 16, 95 S. Ct. 1225, 43 L.Ed.2d 514 (1975)); *Califano v. Goldfarb*, 430 U.S. 199, 212-13, 97 S. Ct. 1021, 51 L.Ed.2d 270 (1977). *See also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 727, 102 S. Ct. 3331, 73 L.Ed.2d 1090 (1982) (finding no resemblance between the "alleged objective" of excluding men from nursing school in order to engage in "educational affirmative action" benefitting women and the "actual purpose underlying the discriminatory classification," and thus rejecting the state's justification for the intentional discrimination on the face of the admissions rule) (*cited in Virginia*, 518 U.S. at 536, 116 S. Ct. 2264).

In addition, Defendant MHSAA cannot prevail by attempting to demonstrate that its intent was to help or protect girls by scheduling their sports when they have been if that "help" actually harms them or is based on paternalistic notions. *Cf. Frontiero v. Richardson*, 411 U.S. 677, 684-85, 93 S. Ct. 1764, 36 L.Ed.2d 583 (1973) (finding that stereotyped distinctions between the sexes in law and official action at issue were made because of paternalistic notions where male military officers could automatically claim wives as dependents for extra benefits, but female

military officers had to prove that husbands were financially dependent to claim them as dependents).

As an initial matter, Defendant MHSAA is clearly responsible for the current placement of the sports seasons. Having the ability to set the beginning and closing dates of a season, to schedule the championship tournament, and to punish those who play the sport outside of the MHSAA-designated dates is obviously the ability to schedule a season. The fact that individual schools, conferences, and leagues decide competition dates within the parameters of the season is of no consequence. It is the parameters that determine what time of year a sport is played.

Defendant MHSAA must show that its classification between the sexes in scheduling sports' seasons serves important governmental objectives and that this scheduling is substantially related to the achievement of those objectives. The MHSAA's justification or justifications must be "exceedingly persuasive." The Court finds that the MHSAA has not met this burden.

The Court has concluded that none of the girls' sports at issue are scheduled in the advantageous season, for reasons fully explained in the Findings of Fact. The MHSAA's only other legitimate asserted objective for the separate scheduling, and in the case of volleyball, non-traditional scheduling, is to maximize athletic participation opportunities for both boys and girls. The MHSAA argues that its current scheduling system maximizes high school athletic participation opportunities by creating optimal use of existing facilities, officials and coaches, thereby permitting more teams in a sport or more spots on a team. The MHSAA also argues that the quality of the programs are maximized by the current scheduling, as well, as a result of the better officials and coaches being able to work over two separate seasons with both boys and girls, instead of splitting their time in one season between boys and girls or forcing schools to broaden the pool of officials and coaches,

opening up positions to people the MHSAA asserts would be less qualified individuals.

While these logistics-based objectives are "important," the Court concludes that the discriminatory scheduling is not "substantially related" to the achievement of those asserted objectives. The empirical evidence was wholly insufficient. The MHSAA chose to rely on anecdotal and weak circumstantial evidence instead, which is not enough. Even assuming that the MHSAA had sufficiently proven this point, that would not justify forcing girls to bear all of the disadvantageous playing seasons alone to solve the logistical problems. Moreover, the logistics justification smacks of post hoc rationalization for a system that only in the relatively recent past decided that girls were entitled to play sports and be treated fairly in athletics. As a result, this Court comes to the conclusion that Defendant MHSAA violated and continues to violate the Fourteenth Amendment of the United States Constitution by its current scheduling of seasons for the sports at issue.

II. PLAINTIFFS' TITLE IX CLAIM

A. Defendant MHSAA is Subject to Title IX by Virtue of Its Controlling Authority Over Interscholastic Athletics in Michigan

Section 901(a) of Title IX of the Education Amendments of 1972 provides, with exceptions not applicable here, that "[n]o person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...." 20 U.S.C. § 1681(a) (2001). For Plaintiffs to prevail on their Title IX claim, they must first establish that Defendant MHSAA is subject to Title IX.

This Court held earlier during the course of this litigation that "any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of

federal aid." *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F.Supp 2d 729, 735 (W.D.Mich.2000). Based on the findings of fact, the Court must decide the extent to which Defendant MHSAA exerts control over interscholastic athletic programs of Michigan high schools, which are almost all federal funding recipients, to determine if Title IX applies to Defendant. *Id.* at 738. If Defendant exerts controlling authority over the scheduling of interscholastic sports seasons in Michigan, Defendant will be subject to Title IX's non-discrimination requirement in its scheduling of the seasons.

In *NCAA v. Smith*, the Supreme Court expressly declined to consider whether "controlling authority" is a basis on which an entity can be subject to Title IX. *NCAA v. Smith*, 525 U.S. 459, 470, 119 S. Ct. 924, 142 L.Ed.2d 929 (1999). The Sixth Circuit Court of Appeals also has not considered the "controlling authority" question. This Court extensively outlined its reasons for finding that Congress intended to apply Title IX to those entities exercising controlling authority over a federal program or programs, whether or not the entity itself is a recipient of federal funding, in its previously published opinion in this case on this topic. *See Communities for Equity*, 80 F.Supp 2d at 733-35. Defendant MHSAA urges the Court to reconsider this position on this issue, but the Court declines to do so.

Defendant cites to an opinion by another federal district court taking the opposite position of this Court and holding that entities not receiving federal funds may not be held liable under Title IX. *See Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Illinois*, 134 F.Supp 2d 965, 970 (N.D.Ill.2001).[52] This Court, in previously discussing this issue, noted that the Supreme Court has previously held

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[52] Presumably because most Federal Circuit Courts, as well as the Supreme Court, have not taken up the issue, the court in *Johnny's Icehouse* recognized that its decision faced the "undeniable potential for a contrary ruling," as this Court recognizes that its decision does. *See Johnny's Icehouse*, 134 F.Supp 2d at 971.

that Title IX has "two related, but nevertheless somewhat different objectives ... Congress wanted to avoid the use of federal resources to support discriminatory practices; [and] it wanted to provide individual citizens effective protection against those [discriminatory] practices." *Communities for Equity*, 80 F.Supp 2d at 733 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 704, 99 S. Ct. 1946, 60 L.Ed.2d 560 (1979)). This Court then found that:

> Not only is Defendants'[53] suggested interpretation of Title IX unsupported by the plain meaning of Title IX and the *Cannon* decision, it is empty formalism. If Defendants' interpretation prevailed, Title IX would prohibit "recipients" of federal funds from discriminating on the basis of sex, but would allow entities that controlled those funds to discriminate so long as those entities were not themselves "recipients." Such a scheme would not only encourage "recipients" of federal funds to transfer control over those funds to others (because both parties could thereby avoid Title IX liability), it would allow federal funds to promote gender discrimination so long as the recipients of those funds empowered someone else to promulgate the discriminatory policies. In this Court's view, such a formalistic interpretation is not warranted by the meaning or purpose of the statute.

Communities for Equity, 80 F.Supp 2d at 734. The federal district court in *Johnny's Icehouse* criticized the above reasoning of this Court with the argument that a funding recipient, like a school, may be liable if it fails to respond appropriately to discriminatory acts of non-agent third parties. *Johnny's Icehouse*, 134 F.Supp 2d at 970 (citations

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[53] At the time of that opinion, the MHSAA and a number of individuals were Defendants in this suit, but the individuals have since been dismissed.

omitted). Therefore, "controlling authority" liability under Title IX is not necessary to achieve the purposes of Title IX. Further, the *Johnny's Icehouse* Court reasoned that "controlling authority" liability is not authorized by Title IX.

This Court, however, respectfully disagrees with that reasoning. It is true that the Supreme Court has held funding recipients not liable for the discriminatory actions of their "agents" under Title IX, pursuant to a *respondeat superior* theory, where there is no evidence that a funding recipient knew or should have known about the discrimination. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283, 118 S. Ct. 1989, 141 L.Ed.2d 277 (1998) (*cited in Johnny's Icehouse*, 134 F.Supp 2d at 970). In Gebser, a case where a school was sued for its failure to prevent sexual harassment by a teacher against a student, the Supreme Court held that "a damages remedy will not lie under Title IX *unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf* has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Gebser*, 524 U.S. at 290, 118 S. Ct. 1989 (emphasis added).

However, an entity with "controlling authority" over a recipient is not an agent of the recipient by the very nature of their relationship; instead, the recipient becomes like an agent and the controlling entity like a principal in the relationship. In situations like the one in this case, the nature of what needs to be accomplished by a group of recipients (here, controlling and regulating athletics) requires that the funding recipient-schools cede their own ability to control many aspects of their schools' athletic programs to the controlling entity-athletic association. Thus, after the recipient schools cede authority, if a recipient school believes that an athletic association is illegally discriminating, that one school alone has no authority or ability to stop the athletic association, unless it can convince a sufficient number of other schools and those

schools together would be able to change the association's action.

A school's only immediate recourse to stop its own "participation" in the discrimination is to discontinue offering an athletic program to its students, since the school cannot realistically offer a program without belonging to the association. In effect, one individual school cannot, in fact, be held liable for the association's Title IX violation because the recipient-school no longer has the "authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf." *See Gebser*, 524 U.S. at 290, 118 S. Ct. 1989. It is true that "a funding recipient may be liable if it fails to respond appropriately to the discriminatory acts of nonagent third parties," *Johnny's Icehouse*, 134 F.Supp 2d at 971, but the law must fill the gap where the recipient has no effective way of responding appropriately because of its relationship with the third party. "Controlling authority" theory is needed to address this deficiency and effectuate the intent of Congress when it passed Title IX.

Moreover, contrary to Defendant MHSAA's other argument, "controlling authority" theory is consistent with what has been called the "contractual" character of Title IX. Title IX is legislation enacted under the Spending Clause, or in other words, is an exercise of Congressional power to fix the terms upon which federal funds will be disbursed. *Cf. Guardians Ass'n v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 598-99, 103 S. Ct. 3221, 77 L.Ed.2d 866 (1983) (White, J.) (discussing Title VI); *see also Department of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605, 106 S. Ct. 2705, 91 L.Ed.2d 494 (1986) ("Under the program-specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision.").

Against this background, *Johnny's Icehouse* found that imposing Title IX obligations on "any ... entity not in contractual privity with the federal government or without the power to decide whether or not to accept federal financial assistance—would not fit into the Spending Clause foundation for the statute." *Johnny's Icehouse*, 134 F.Supp 2d at 970.[54] However, the Third Circuit case that *Johnny's Icehouse* cited for that proposition specifically did "not suggest that an absence of privity means that in no circumstances may a controlling authority argument be viable; we note that those who truly assume control of federally-funded programs are in a position to accept or reject that control as part of a decision whether or not to receive federal funds indirectly." *Cureton v. NCAA*, 198 F.3d 107, 118 (3d Cir. 1999). The Third Circuit instead suggested that an absence of contractual privity between the entity sued and the federal funding source should give a court caution in imposing Title VI, or Title IX, obligations on the entity sued. *See id.*

This Court has heeded the persuasive warning of caution from the Third Circuit, and after consideration, believes that "controlling authority" theory is consistent with the contractual nature of liability under Title IX. Normally, contractual privity between the entity sued and the federal funding source should be required to hold the entity liable under Title IX, and this is the situation covered when indirect recipients of federal aid are subject to the requirements of Title VI, Title IX or § 504. *See Grove City*

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[54] *Johnny's Icehouse* cited to an opinion discussing Title VI, but courts have generally drawn analogies between Title IX, Title VI, and § 504 of the Rehabilitation Act of 1973 because of the similarities in these laws. *See NCAA v. Smith*, 525 U.S. 459, 467-69, 119 S. Ct. 924, 142 L.Ed.2d 929 (1999) (looking at case law interpreting § 504 of the Rehabilitation Act to interpret Title IX); *Department of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 600 n. 4, 106 S. Ct. 2705, 91 L.Ed.2d 494 (1986) (Title VI case law can generally be relied on to interpret later statutes, like Title IX). This Court will draw the same analogies where case law concerns Title VI or § 504.

College v. Bell, 465 U.S. 555, 563-64, 104 S. Ct. 1211, 79 L.Ed.2d 516 (1984) (holding that college was subject to Title IX, even where students directly received the federal aid in loans and grants, but college was the indirect recipient of that aid).[55]

In another case, the Supreme Court held that airlines could not be subjected to a program-specific statute, § 504 there, because they were mere "beneficiaries" of federal funds, but not indirect recipients of airports' federal funding. *Paralyzed Veterans*, 477 U.S. at 607, 106 S. Ct. 2705 (citing *Grove City College v. Bell*, 465 U.S. 555, 104 S. Ct. 1211, 79 L.Ed.2d 516 (1984)). The Supreme Court there distinguished between colleges and airlines in these two cases by noting that an "intended recipient" of federal funds was liable under the program-specific statutes like Title IX, so colleges were liable because Congress meant to deliver money to them using college students as conduits, but airlines were not liable because Congress was not trying to aid them and they were mere beneficiaries of the funding. *See id.* at 606-07, 106 S. Ct. 2705.

In that vein, holding entities with "controlling authority" power over recipients liable under Title IX is consistent with the contract-like nature of Congress' power under the Spending Clause to set conditions for the use of federal money. A "controlling authority" over a funding recipient is more than a mere beneficiary of federal funds and is instead more like a recipient of the funds through its control of

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[55] *Grove City College* continues to be good law on the point for which this Court cites it. Part of *Grove City College* was subsequently superceded by Congressional action, however. The Supreme Court also held in *Grove City College* that Title IX was only intended to apply to the particular program or activity receiving the indirect assistance. *Grove City College*, 465 U.S. at 570-74, 104 S. Ct. 1211. Congress later enacted the Civil Rights Restoration Act of 1988 to clarify that the Supreme Court misinterpreted its intent in the coverage of Title IX and the other program-specific statutes, legislating instead that the coverage was broader than the specific program receiving assistance. *See* Civil Rights Restoration Act of 1987, Pub.L. No. 100-259, 102 Stat. 28 (1988).

important parts of the funding recipient's program. Congress grants federal money to states and school districts to help pay for educational programs generally, making non-discrimination conditions on the funds. When an educational program like interscholastic athletics requires a governing body like the MHSAA—a body having "controlling authority" over member schools in certain aspects of the educational program—the MHSAA accepts the conditions in which member schools must operate when it implicitly contracts with the federal government to become responsible for organization of interscholastic athletic programs funded in part by federal resources.

The MHSAA is not an indirect recipient of federal funds, because it does not receive dues from the coffers of member schools, which has been the basis of Title IX liability for other state high school athletic associations. *See Horner*, 43 F.3d at 272 n. 5 (finding the Kentucky High School Athletic Association to be subject to Title IX as an indirect recipient of federal funds). But the MHSAA receives revenues to which member schools would otherwise be entitled, like tournament receipts, souvenir sales, and broadcast fees, and it operates tournaments largely using public facilities and public employees. Moreover, the MHSAA's legislative functions are conducted by mostly public school employees representing their schools. Finally, the MHSAA understands its function as controlling and regulating certain parts of member schools' athletic programs and has thus implicitly contracted with the federal government and had notice to obey the conditions under which member schools receive federal funding, funding which helps schools run athletic programs in the first place.

Defendant MHSAA clearly is the "controlling authority" over schools when it comes to scheduling of the sports seasons. Again, the MHSAA's power to declare beginning and closing dates of a season and dates of championship tournaments, as well as to punish those who play the sport outside of the MHSAA-designated dates, is the power to

schedule a season. No member school alone or even in concert with many other schools has the power to do this. A single school or consortium of schools, no matter how large, would still have to seek action within the MHSAA to change seasons. Therefore, Plaintiffs' evidence has firmly proved that Defendant MHSAA exerts "controlling authority" over the scheduling of interscholastic sports in the State of Michigan such that the MHSAA must comply with the mandate of Title IX.

B. Defendant MHSAA Has Violated Title IX With Its Current Seasons Scheduling

Plaintiffs must next establish that Defendant MHSAA's current scheduling of interscholastic sports seasons violates Title IX. The Court finds that Plaintiffs have established a Title IX violation. The United States Department of Education, as a federal department empowered to extend federal financial assistance to any education program or activity, has been directed to promulgate rules and regulations consistent with the objectives of Title IX. 20 U.S.C. § 1682 (2001).

As applied to interscholastic athletics, the Department of Education has promulgated the following regulation:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such activities separately on such basis.

34 C.F.R. § 106.41(a). To the extent that Plaintiffs have demonstrated that female high school athletes are denied the benefits of school athletic programs as a result of the scheduling system of Defendant MHSAA that they would

otherwise enjoy if they were male, Plaintiffs have proved a Title IX violation.[56]

In addition, the federal agency originally charged with interpreting regulations and investigating alleged violations of Title IX has noted that elements of a program's structure like seasons of play can constitute a violation. Practices such as employing disadvantageous playing seasons for only one sex violate Title IX when the resulting harms are substantial enough to deny equal participation opportunities and benefits in athletics to students of one sex. *See* Department of Health, Education, and Welfare, Office for Civil Rights (OCR) Policy Interpretation, 44 Fed.Reg. 71413, 71416-71418 (1979). OCR also considers "[w]hether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity." *Id.* at 71418.

Finally, Defendant MHSAA continues to make the erroneous argument that it does with respect to Plaintiffs' Fourteenth Amendment claim that a claim under Title IX requires proof that the MHSAA had animus toward girls. It

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[56] Title IX claims in the area of athletics often fall into two categories corresponding to the regulations promulgated under Title IX: equal treatment claims, which this case presents, or effective accommodation claims. *Boucher v. Syracuse Univ.*, 164 F.3d 113, 115 n. 1 (2d Cir.1999) (*cited in Pederson v. Louisiana State Univ.*, 213 F.3d 858, 865 n. 4 (5th Cir.2000)). Equal treatment claims derive from Title IX regulations calling for equal provision of athletic benefits and opportunities among the sexes. *Boucher*, 164 F.3d at 115 n. 2 (*cited in Pederson*, 213 F.3d at 865 n. 4).

The MHSAA agrees that Title IX assesses the athletic program of a liable party, but it also argues that Title IX does not assess the impact that "outside, business interests," like amateur athletic clubs and colleges and universities, have on these programs. That twists the issue. If discriminatory operation of the state's athletic programs through placement of seasons "denie[s] [girls] the benefits of, or ... subject[s] [girls] to discrimination" in interscholastic athletics such that girls' amateur and collegiate opportunities are limited in a way that boys' opportunities are not, Title IX is implicated.

does not. "Intentional discrimination" in the context of a Fourteenth Amendment violation means only that the MHSAA needs to have intended to treat girls differently from boys by intentionally scheduling them in different seasons than those in which boys play, which it clearly did, or by scheduling the girls-only sport of volleyball in a "non-traditional" season when boys-only sports are always played in "traditional" seasons, which it clearly did. As explained *supra*, that kind of "intentional discrimination" can be justified under certain circumstances, even though the Court has found that in this case it is not.

A Title IX violation similarly does not require proof that the MHSAA intended to hurt girls and chose the scheduling system as a way to do that. The Court's task is to analyze the resulting athletic opportunities for girls and boys from the different treatment that they experience by being placed in different athletic seasons, and if girls receive unequal opportunities, Title IX has been violated. Different treatment can still result in equal opportunities for boys and girls, but it also may not, which is the reason for analyzing and comparing the benefits and the burdens of the differential treatment.

Language in a Fifth Circuit case is relied on by Defendant MHSAA who asserts that Title IX requires Plaintiffs to show that Defendant intended to harm girls in the scheduling of their seasons. *See Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir.2000). In that case, it was clear that Louisiana State University (LSU) was providing unequal athletic opportunities for its female students, for example, by only sponsoring new sports for women that administrators considered "more feminine" sports or by refusing to sponsor fast-pitch softball because "the women might get hurt." *Pederson*, 213 F.3d at 881. The federal district court there found that LSU was violating Title IX, but for the purposes of deciding whether monetary relief was due to Plaintiffs in addition to injunctive relief, the district court determined that the

discrimination was unintentional and thus Plaintiffs could not obtain monetary relief. *Pederson*, 912 F.Supp. 892, 917 (M.D. La. 1996). The district court still ordered injunctive relief, however, on the basis of the Title IX violation. *Id.* at 921. That is the only kind of relief requested in this lawsuit.

After reviewing the facts, the Fifth Circuit reversed the district court's finding that the LSU discrimination was unintentional, held that LSU was intentionally discriminating between women and men, and held that the district court erroneously dismissed the monetary damages claims. *Pederson*, 213 F.3d at 884. But in determining whether an "effective accommodation" violation of Title IX was present, which is unlike the "equal treatment" violation alleged here, the Fifth Circuit affirmed the district court's finding that LSU was not effectively accommodating the sports interests of its female students. *Id.* at 879.

Pederson held that regulations promulgated under Title IX guide a court's analysis as to whether a violation has occurred. *Pederson*, 213 F.3d at 879. This is the analysis that this Court has articulated: in an "equal treatment" violation under Title IX, the question is whether female high school athletes are denied the benefits of school athletic programs as a result of the scheduling system of Defendant MHSAA that they would otherwise enjoy if they were male.

In the Findings of Fact, the Court found that all of the girls' sports at issue where a counterpart boys' team exists are subject to disadvantages to which they would not otherwise be subject if they played in the seasons that the boys do. Moreover, the Court found that girls who play volleyball in the non-traditional season in which it is now scheduled suffer disadvantages that they would not otherwise suffer if they were male and participated in a boys-only sport that was scheduled in its traditional season. As a result, this Court comes to the conclusion that Defendant MHSAA violated and continues to violate Title IX by scheduling seasons of the sports at issue in the manner in which it has.

III. PLAINTIFFS' ELLIOTT-LARSEN CIVIL RIGHTS ACT CLAIM

There are two provisions of the Elliott-Larsen Civil Rights Act (ELCRA), Mich. Comp. Laws § 37.2101, *et seq.*, Michigan's civil rights statute, at issue in this litigation. One applies to the acts of "educational institutions." The other applies to discrimination in the provision of public accommodation and/or public services. Under the ELCRA provision prohibiting discrimination in Michigan in the provision of a public service or public accommodation, this Court finds that Defendant MHSAA violated Plaintiffs' rights under the ELCRA.

A. Mich. Comp. Laws § 37.2402

First, "educational institutions" are prohibited from discriminating against individuals in their benefit from the institution, or services, activities, or programs provided by the institution, on the basis of an individual's sex. Mich. Comp. Laws § 37.2402 (2001). The definition of "educational institutions" includes "an agent of an educational institution." Mich. Comp. Laws § 37.2401 (2001). Therefore, if Defendant qualifies as an agent of the schools that comprise its membership, Defendant is subject to the ELCRA under this provision of the ELCRA.

"Agent" is not defined in the ELCRA. This Court's research turned up no Michigan cases, nor any federal cases interpreting Michigan law, defining what an "agent" of an "educational institution" is for purposes of the ELCRA. Under Michigan law generally, in determining "[w]hether an agency has been created," a court is to consider "the relations of the parties as they in fact exist under their agreements or acts." *St. Clair Intermed. Sch. Dist. v. Intermediate Educ. Ass'n/Michigan Educ. Ass'n*, 458 Mich. 540, 557, 581 N.W.2d 707 (1998) (quoting *Saums v. Parfet*, 270 Mich. 165, 170-171, 258 N.W. 235 (1935)). The Michigan Supreme Court has noted that in its broadest sense agency "includes every relation in which one person acts for or

represents another by his authority." *Id.* An agent is a business representative whose function it is to bring about, modify, affect, accept performance of, or terminate contractual obligations between the agent's principal and third persons. *Id.* at 557-58, 581 N.W.2d 707. Also fundamental to the existence of an agency relationship is the right to control the conduct of the agent with respect to the matters entrusted to the agent. *Id.* at 558, 581 N.W.2d 707 (citations omitted).

The Court finds that the MHSAA cannot be liable to ELCRA claims under this section because it cannot be considered its member schools' agent. The Michigan Supreme Court has said that it is "fundamental" to finding that one party in a relationship is an agent that the principal be able to control the conduct of the agent with respect to the matters entrusted to the agent. One member school alone cannot control the actions of the MHSAA, so the MHSAA is not the "agent" of any one member school.

Moreover, the member schools together cannot be considered a "principal" because they cannot together be one "educational institution" under the statute, as they in fact constitute many educational institutions. Additionally, the member schools have come together in the form of the MHSAA largely to make contracts among themselves, regarding eligibility rules, etc., which is an associational relationship, but not an agency.

B. Mich. Comp. Laws § 37.2302

The ELCRA also covers those entities providing public accommodation or public services. "Except where permitted by law, a person shall not: (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public services because of ... sex ...." Mich. Comp. Laws § 37.2302 (2001).

A "person" is defined as "an individual, agent, association, corporation, ... unincorporated association, the state or a political subdivision of the state, or any agency of

the state, or any other legal or commercial entity." Mich. Comp. Laws § 37.2103(g) (2001). Surely, Defendant MHSAA is a "person" for these purposes since it has incorporated itself with the State of Michigan. (Tr. Exh. 28 (MHSAA Articles of Incorporation).) It could also aptly be described as an "association" given its structure, and while it is not dispositive, the fact that the word "association" also appears in its name lends support to this conclusion.

In addition, this Court finds that the MHSAA provides both a "public service" and a "public accommodation." A "public service" includes "a tax exempt private agency established to provide a service to the public." Mich. Comp. Laws § 37.2301(b) (2001). Lions clubs were held liable under this section of the ELCRA and found to be both providing a "public service" and constituting a "public accommodation." *Rogers v. International Ass'n of Lions Clubs*, 636 F.Supp. 1476, 1479 (E.D. Mich. 1986). The Court held that Lions clubs provided a "public service" because the volunteer efforts by its members were made available to the public. *Id.* The Court also found it important that the Lions were tax exempt. *Id.* To some degree that the Court could not fully determine, the MHSAA is also tax exempt. (*See* Tr. Exh. 36 (copies of MHSAA tax returns)). It certainly was established to provide a service to the public, the organization of interscholastic athletics in the state's schools, and it is still in existence for that purpose. Thus, the MHSAA qualifies as a "public service."[57]

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[57] Moreover, a "public service" also encompasses "a public facility, department, agency, board, or commission owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof ...." Mich. Comp. Laws § 37.2301(b) (2001). It is likely that the MHSAA could also qualify under this definition as well, since the political subdivisions for whom it acts as an agency or commission to control interscholastic athletics are local school boards and schools. These local school boards would otherwise have responsibility for organizing interscholastic athletics or would have to find another vehicle beside the MHSAA to do so. *See* Findings of Fact on Defendant MHSAA.

The MHSAA qualifies as providing a "public accommodation" as well. An event open to the public held in a public place is a place of "public accommodation." *Rogers*, 636 F.Supp. at 1479. For one, the MHSAA sponsors championship tournament events, held in public places and open to members of the general public. Additionally, the MHSAA facilitates the scheduling of interscholastic athletics generally with its activities, and athletic programs hold competitions in public places that are open to the general public on a regular basis. Similarly, the Michigan Supreme Court found that a township's athletic program offered to elementary school children is a "public accommodation" or "public service" under the ELCRA. *Cf. Department of Civil Rights ex rel. Forton v. Waterford Twp. Dep't of Parks and Rec.*, 425 Mich. 173, 202, 387 N.W.2d 821 (1986) (*Forton*) (apparently assuming that the program at issue qualified under Mich. Comp. Laws § 37.2302 and remanding for retrial and for application of the constitutional standard enunciated in the opinion).

The Michigan Supreme Court determined that the goal of the Michigan Legislature in adopting this provision of the ELCRA was to broaden the scope of those parties to whom civil rights legislation would apply in the State of Michigan, in contrast to comparable federal provisions. *Forton*, 425 Mich. at 188-89, 387 N.W.2d 821. Most notably, the ELCRA covers non-governmental conduct in the handling of public accommodations and services that federal provisions do not. *Id.* at 186, 387 N.W.2d 821.

C. Standard to Find Discrimination Under Mich. Comp. Laws § 37.2302

But the Michigan Supreme Court held that the goal of ELCRA was not to broaden the standard of equal protection, i.e., not to require stricter scrutiny of laws that classify on the basis of protected characteristics than federal law would, but instead to provide the same level of scrutiny of discriminatory classifications. *Forton*, 425 Mich. at 188-89, 387 N.W.2d 821. *Forton*, which also involved a claim

strikingly similar to this case, involved a challenge to a township's practice of assigning different seasonal schedules to township league teams for elementary school students on the basis of sex in its township athletic program. *Forton*, 425 Mich. at 190, 387 N.W.2d 821. The Michigan Supreme Court held that the applicable standard to determine whether unlawful discrimination has occurred because of a discriminatory classification is the same standard used under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Forton*, 425 Mich. at 190, 387 N.W.2d 821 (applying to "public accommodation" claims). *See also Alspaugh v. Comm'n on Law Enforcement Standards*, 246 Mich. App. 547, 555-56, 634 N.W.2d 161 (2001) (using intermediate scrutiny in ELCRA challenge by males to state police's different passing standards for males and females); *Garrett v. Board of Educ. of Sch. Dist. of City of Detroit*, 775 F.Supp. 1004, 1010 (E.D. Mich. 1991) (citing *Forton*, 425 Mich. at 190, 387 N.W.2d 821).[58]

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[58] *Garrett* involved a challenge by girls and their parents to the establishment of all-male public school academies in Detroit. *Garrett*, 775 F.Supp. at 1005. Like the instant case, *Garrett* presented an intentional discrimination claim because the school system had a rule that on its face differentiated between males and females, i.e., female children were not permitted to attend an all-male, public academy. *See id.* at 1006 (proceeding to consider whether the claim serves "important governmental objectives" and that the discriminatory classification involved was "substantially related to the achievement of those objectives" because of the rule treating girls and boys differently in admission).

Another federal court in Michigan has stated that plaintiffs bringing an ELCRA claim under *either* an intentional discrimination or disparate impact theory must produce facts from which the finder of fact could reasonably infer unlawful motivation. *Sanders v. Southwest Airlines Co.*, 86 F.Supp 2d 739, 744 (E.D. Mich. 2000). This Court respectfully finds that to be an erroneous interpretation of Michigan law.

The Michigan Supreme Court is the highest authority on the meaning of Michigan law. As explained in this opinion, the Michigan Supreme Court has held that ELCRA claims are evaluated under the same

standards as federal Equal Protection claims are. *Forton*, 425 Mich. at 190, 387 N.W. 2d 821. Under federal law, an intentional discrimination claim does not require proof of discriminatory motivation because the challenged law or rule has already discriminated against a protected class on its face. *Cf. Virginia*, 518 U.S. at 532-34, 116 S. Ct. 2264 (compare *Washington v. Davis*, 426 U.S. at 241-242, 96 S. Ct. 2040). *Forton*, as an intentional discrimination case, employed the intermediate scrutiny standard for sex-based classifications that the U.S. Supreme Court still employs.

Sanders cites cases from the Michigan Court of Appeals for its proposition requiring discriminatory motivation in cases presenting a facial classification. *See Reisman v. Regents of Wayne State Univ.*, 188 Mich. App. 526, 538, 470 N.W. 2d 678 (1991); *Meagher v. Wayne State Univ.*, 222 Mich. App. 700, 708-09, 565 N.W. 2d 401 (1997); *Fonseca v. Michigan State Univ.*, 214 Mich. App. 28, 31, 542 N.W. 2d 273 (1995) (*cited in Sanders*, 86 F.Supp. 2d at 744). But cases to which *Sanders* cites are all disparate impact cases, so those type of cases *do* require proof of discriminatory motivation in addition to proof that a member or members of a protected class have been disparately impacted by a law, rule or decision otherwise neutral on its face. In turn, these Michigan Court of Appeals cases all cite to other disparate impact cases, all employment discrimination cases with the exception of *Fonseca*, containing a summary statement with the proposition that both intentional discrimination and disparate impact claims require proof of discriminatory motivation behind the decision, but none of them cite *Forton*. After *Forton*, that proposition was implicitly rejected by the Michigan Supreme Court. *Cf. Forton*, 425 Mich. at 190, 387 N.W. 2d 821.

For citation history of Reisman, see Singal v. General Motors Corp., 179 Mich. App. 497, 502-03, 447 N.W. 2d 152 (1989) (*cited in Reisman*, 188 Mich. App. at 538, 470 N.W. 2d 678); *Dixon v. WW Grainger, Inc.*, 168 Mich. App. 107, 114, 423 N.W. 2d 580 (1987) (*cited in Singal*, 179 Mich. App. at 503, 447 N.W. 2d 152); *Jenkins v. Southeastern Michigan Chapter, Amer. Red Cross*, 141 Mich. App. 785, 793-94, 369 N.W. 2d 223 (1985) (*cited in Dixon*, 168 Mich. App. at 114, 423 N.W. 2d 580); *Michigan Civil Rights Comm'n ex rel. Boyd v. Chrysler Corp.*, 80 Mich. App. 368, 373 n. 3, 263 N.W. 2d 376 (1977) (*cited in Jenkins*, 141 Mich. App. at 794, 369 N.W. 2d 223) (discussing the pleading requirements for a disparate treatment, employment discrimination case).

For citation history of Meagher, see Reisman, 188 Mich. App. at 538-39, 470 N.W. 2d 678 (*cited in Meagher*, 222 Mich. App. 708-09, 565 N.W. 2d 401); *Lytle v. Malady*, 209 Mich. App. 179, 185 n. 1, 530 N.W. 2d 135 (finding, without citation, that intentional discrimination and disparate impact are the same theory) (*cited in Meagher*, 222 Mich. App. at 709, 565 N.W. 2d 401) (*Lytle* rev'd on other grounds, 456 Mich. 1, 566 N.W. 2d 582

Thus, the standard for decision under Plaintiffs' ELCRA claim is the same as under their Fourteenth Amendment claim. As stated in the above discussion of why Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment have been violated, the Court similarly finds that Defendant MHSAA has violated the ELCRA.

CONCLUSION

"Parents, athletes and spectators should insist on equality for women's athletics. It's nothing less than the law, and nothing less than women athletes deserve." -Editorial, *You Go, Girls*, St. Louis Post-Dispatch, July 13, 1999, at B16.

Unfortunately, the insistence required in this case took the form of legal action. The history of girls' sports lends a belief that girls' seasons were originally put in the seasons

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(1997)) (partially vacated on other grounds, 458 Mich. 153, 579 N.W. 2d 906 (1998)); *Brewster v. Martin Marietta Aluminum Sales, Inc.*, 145 Mich. App. 641, 654, 378 N.W. 2d 558 (1985) (*cited in Meagher*, 222 Mich. App. at 709, 565 N.W. 2d 401); *Boyd*, 80 Mich. App. at 373 n. 3, 263 N.W. 2d 376 (*cited in Brewster*, 145 Mich. App. at 654, 378 N.W.2d 558; *Schipani*, 102 Mich. App. at 617, 302 N.W. 2d 307); *Jenkins*, 141 Mich. App. 785, 369 N.W. 2d 223 (*cited in Brewster*, 145 Mich. App. at 654, 378 N.W. 2d 558); *Schipani v. Ford Motor Co.*, 102 Mich. App. 606, 617, 302 N.W. 2d 307 (1981) (*cited in Brewster*, 145 Mich. App. at 654, 378 N.W. 2d 558) (*Schipani* recognized by *Kostello v. Rockwell Intern. Corp.*, 189 Mich. App. 241, 245, 472 N.W. 2d 71 (1991) as routinely rejected by other panels on other grounds).

Fonseca was a claim by a student not accepted to an MSU graduate program that her rejection was for discriminatory reasons, similar to employment discrimination cases where an individual is fired or denied promotion for allegedly discriminatory reasons. *Fonseca*, 214 Mich. App. at 29, 542 N.W. 2d 273. In *Fonseca*, the Court of Appeals made no statements with respect to claims proven through intentional discrimination shown through a rule or classification discriminatory on its face, but only concerned decisions allegedly made for discriminatory reasons, which must be proved to state a disparate impact claim. *See id.* at 31, 542 N.W. 2d 273.

that they were for impermissible reasons, and they simply have not been moved because of inertia or out of concern for the inconveniences that boys' programs would face. Continued administrative convenience of being able to find facilities, coaches or officials more easily if girls and boys are in separate seasons also does not justify such a system where the separate seasons are not equal for girls. If lack of resources is indeed a reality that requires single-sex seasons in some sports, which was not proved to the Court's satisfaction, then that is a reality that boys must also share.

The MHSAA has provided examples to this Court where it has been pro-active in promoting gender equity in sports. While the Court applauds the MHSAA on these efforts, the fact that the MHSAA may have been or continues to be pro-active in promoting gender equity in some areas of interscholastic sports in Michigan is not relevant to the fact that the MHSAA has acted contrary to law requiring gender equity in the particular situation before this Court. Frankly, conducting an unbiased examination of the facts and listening to dissenters, instead of merely surveying, would have told the MHSAA a long time ago what this Court is now telling it.

The Court will declare that the MHSAA's current scheduling of high school girls' sports in Michigan violates the Equal Protection Clause of the Fourteenth Amendment, Title IX, and Michigan's Elliott-Larsen Civil Rights Act. The Court will enjoin Defendant MHSAA from continuing its current scheduling of interscholastic athletics seasons in Michigan. As a result, the Court will retain jurisdiction over this case to order that an appropriate remedy be adopted in a Compliance Plan to be submitted by Defendant MHSAA.

The Court will order that Defendant MHSAA bring its scheduling of the seasons of high school sports into compliance with the law by the 2003-2004 school year. Defendant MHSAA will be ordered to submit a Compliance Plan consistent with this Opinion by June 24, 2002, detailing

a new schedule for sports seasons that complies with the law.

The parties are reminded that Defendant MHSAA may design the new schedule in a number of different ways, and as long as girls and boys share the advantages and disadvantages of the new seasons equitably, this Court will approve the Compliance Plan. For example, Defendant MHSAA is not required to combine seasons of girls' teams and boys' teams in any particular sport, but any remaining single-sex seasons must as a group advantage and disadvantage girls and boys equally. In addition, nothing prevents Defendant MHSAA from utilizing various other scheduling mechanisms designed to treat males and females alike, such as putting freshman and/or junior varsity teams of both sexes into the disadvantageous season while putting varsity teams of both sexes into the advantageous season.

After Defendant MHSAA submits its Compliance Plan proposing how it will reschedule interscholastic sports seasons to comply with applicable law, Plaintiffs and the United States will be given the opportunity to respond to the MHSAA's proposed Compliance Plan. Plaintiffs and the United States will be ordered to respond to Defendant MHSAA's Compliance Plan by July 15, 2002 or within fourteen days of service of the plan on Plaintiffs and the United States, whichever is earlier.

At that time, the Court will decide whether the Compliance Plan of new seasons scheduling complies with the applicable law and is an appropriate remedy. The Court will also order briefing from the parties on the issue of whether Plaintiffs are entitled, under 42 U.S.C. § 1988, to payment of their attorneys' fees by Defendant MHSAA and the appropriate amount. Finally, the Court will approve the partial settlement reached by Plaintiffs and Defendant MHSAA on other issues originally part of this litigation and will enter the Consent Decree at the same time as this Opinion.

No. 02-1127

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMUNITIES FOR EQUITY,
Plaintiff-Appellee,

v.

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, Defendant-Appellant.

[FILED]
[DEC 07, 2006]
[LEONARD GREEN, CLERK]

ORDER

BEFORE: KENNEDY, COLE, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

U.S. Constitution Amendment XIV

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

20 USCS § 1681

§ 1681. Sex

(a) Prohibition against discrimination; exceptions. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition. in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions. in regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act [enacted June 23, 1972], nor for six years after such date in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets. this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine. this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy. in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations. this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 [26 USCS § 501(a)], the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences. this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions. this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants. this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

* * *

ELLIOTT-LARSEN CIVIL RIGHTS ACT

M.C.L. 37.2101 *et seq.*

* * *

37.2101 Short title.

Sec. 101. This act shall be known and may be cited as the "Elliott-Larsen civil rights act".

* * *

37.2103 Definitions.

Sec. 103. As used in this act:

(a) "Age" means chronological age except as otherwise provided by law.

(b) "Commission" means the civil rights commission established by section 29 of article V of the state constitution of 1963.

(c) "Commissioner" means a member of the commission.

(d) "Department" means the department of civil rights or its employees.

(e) "Familial status" means 1 or more individuals under the age of 18 residing with a parent or other person having custody or in the process of securing legal custody of the individual or individuals or residing with the designee of the parent or other person having or securing custody, with the written permission of the parent or other person. For purposes of this definition, "parent" includes a person who is pregnant.

(f) "National origin" includes the national origin of an ancestor.

(g) "Person" means an individual, agent, association, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, unincorporated organization, the state or a

political subdivision of the state or an agency of the state, or any other legal or commercial entity.

(h) "Political subdivision" means a county, city, village, township, school district, or special district or authority of the state.

(i) Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:

(*i*) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations, or public services, education, or housing.

(*ii*) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education, or housing.

(*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.

* * *

37.2301 Definitions.

Section 301. As used in this article:

(a) "Place of public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the

public. Place of public accommodation also includes the facilities of the following private clubs:

(*i*) A country club or golf club.

(*ii*) A boating or yachting club.

(*iii*) A sports or athletic club.

(*iv*) A dining club, except a dining club that in good faith limits its membership to the members of a particular religion for the purpose of furthering the teachings or principles of that religion and not for the purpose of excluding individuals of a particular gender, race, or color.

(b) "Public service" means a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public, except that public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment.

37.2302 Public accommodations or services; prohibited practices.

Sec. 302. Except where permitted by law, a person shall not:

(a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

(b) Print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public

service will be refused, withheld from, or denied an individual because of religion, race, color, national origin, age, sex, or marital status, or that an individual's patronage of or presence at a place of public accommodation is objectionable, unwelcome, unacceptable, or undesirable because of religion, race, color, national origin, age, sex, or marital status.

37.2302a Applicability to private club.

Sec. 302a.

(1) This section applies to a private club that is defined as a place of public accommodation pursuant to section 301(a).

(2) If a private club allows use of its facilities by 1 or more adults per membership, the use must be equally available to all adults entitled to use the facilities under the membership. All classes of membership shall be available without regard to race, color, gender, religion, marital status, or national origin. Memberships that permit use during restricted times may be allowed only if the restricted times apply to all adults using that membership.

(3) A private club that has food or beverage facilities or services shall allow equal access to those facilities and services for all adults in all membership categories at all times. This subsection shall not require service or access to facilities to persons that would violate any law or ordinance regarding sale, consumption, or regulation of alcoholic beverages.

(4) This section does not prohibit a private club from sponsoring or permitting sports schools or leagues for children less than 18 years of age that are limited by age or to members of 1 sex, if comparable and equally convenient access to the club's facilities is made available to both sexes and if these activities are not used as a subterfuge to evade the purposes of this article.

37.2303 Exemptions.

Sec 303. This article shall not apply to a private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the private club or establishment are made available to the customers or patrons of another establishment that is a place of public accommodation or is licensed by the state under Act No. 8 of the Public Acts of the Extra Session of 1933, being sections 436.1 through 436.58 of the Michigan Compiled Laws. This section shall not apply to a private club that is otherwise defined as a place of public accommodation in this article.

* * *

FILED
FEB 28 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(7)

No. 06-1038

IN THE

Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Petitioner,

v.

COMMUNITIES FOR EQUITY ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

Of Counsel

MARCIA D. GREENBERGER
JOCELYN F. SAMUELS
DINA K. LASSOW
NEENA K. CHAUDHRY
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180

KRISTEN GALLES
Counsel of Record
EQUITY LEGAL
10 Rosecrest Avenue
Alexandria, VA 22301
(703) 683-4491

H. RHETT PINSKY
PINSKY, SMITH, FAYETTE & KENNEDY
1515 McKay Tower
Grand Rapids, MI 49503
(616) 451-8496

Counsel for Respondents

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QUESTIONS PRESENTED

(1) Whether the Sixth Circuit properly ruled, based on the district court's detailed findings of fact, that the Michigan High School Athletic Association's scheduling of girls' sports only in disadvantageous seasons violates the Fourteenth Amendment's Equal Protection Clause, Title IX, and Michigan's Elliott-Larsen Civil Rights Act.

(2) Whether this Court should address MHSAA's argument that plaintiffs' equal protection claim is displaced by Title IX given that the lower courts have already correctly held that MHSAA violated Title IX as well as state law.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises in a distinctive factual and procedural scenario. It was initially brought as a broad based challenge to practices of the Michigan High School Athletic Association ("MHSAA") that discriminate against girls. After the district court entered a Consent Decree that settled numerous claims, see Consent Decree in Case No. 1:98-CV-479, Dec. 17, 2004 (W.D. Mich.), the case went to trial on one of the discriminatory practices: the scheduling of six girls' sports, and no boys' sports, in nontraditional, disadvantageous seasons.[1]

After trial, the district court held that MHSAA violated the Fourteenth Amendment's Equal Protection Clause, Title IX of the Education Amendments Act of 1972, and Michigan's Elliott-Larsen Civil Rights Act ("ELCRA"), by scheduling girls' sports only in nontraditional or disadvantageous seasons and causing substantial harm to girls, without legally sufficient justification for the discriminatory treatment. Specifically, the court concluded that MHSAA had failed to demonstrate that its discriminatory scheduling was "substantially related" to the achievement of the state's alleged logistical and other objectives, and that even if MHSAA had proven that its scheduling decisions furthered those objectives, "that would not justify forcing girls to bear all of the disadvantageous playing seasons alone to solve the logistical problems." Pet. App. 147a.

In its initial opinion in this case, the Sixth Circuit affirmed the district court's determination that MHSAA violated the Fourteenth Amendment. After this Court remanded the case so that the Court of Appeals could consider the potential application of *City of Rancho Palos Verdes v. Abrams*, 544

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[1] The Consent Decree addressed publicity, additional tournaments for girls, volleyball and golf rules, fast-pitch softball finals and tournament facilities, and girls' basketball tournament sites.

U.S. 113 (2005), the Sixth Circuit reaffirmed its decision that MHSAA violated the Fourteenth Amendment, *and* affirmed the district court's alternate holdings that MHSAA violated Title IX and Michigan's ELCRA. Pet. App. 2a.

This case would be a poor vehicle to decide the equal protection issue MHSAA seeks to raise because its consideration will not change the outcome of this case. The district court found, and the appeals court has affirmed, that MHSAA's scheduling policy violates not only the Constitution, but also Title IX *and* state law. MHSAA seeks to avoid the import of that ruling by claiming that the tests for violation of Title IX and the ELCRA are no different than its test for a violation of the Equal Protection Clause. Practices such as disadvantageous playing seasons, however, violate Title IX when the harms are substantial enough to deny equal participation opportunities in athletics to students of one sex -a finding made by the trial court here. See, *e.g.*, *Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71413, 71418 (Dec. 11, 1979) (codified at 45 C.F.R. Pt. 86) ("*Policy Interpretation*"). No "animus" towards the disadvantaged sex is required. And, with respect to the ELCRA, any similarity in the tests does not alter the fact that there is an independent state law ground for the decision below. Indeed, the Michigan Supreme Court has stated that the ELCRA does not "create a standard *less* protective than the constitutional test developed by the courts in the course of interpreting the equal protection provisions of *both the Michigan and the United States Constitutions*." *Dept. of Civil Rights ex rel. Forton v. Waterford Twp. Dept. of Parks and Rec.*, 425 Mich. 173, 186-87 (1986) (emphasis added).[2]

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[2] In fact, the Michigan Supreme Court emphasized that if the Michigan Constitution "requir[es] a stricter standard than that established under the Fourteenth Amendment, it goes without saying that the standard to be

Moreover, the decisions below, holding that MHSAA's discriminatory scheduling policies violate the Fourteenth Amendment, are entirely consistent with this Court's precedents and do not conflict with decisions from other circuits. Heightened scrutiny is applied to gender-based classifications that harm, and may therefore be challenged by, a plaintiff. *United States* v. *Virginia*, 518 U.S. 515 (1996) ("*VMI*"). MHSAA's argument that its explicit scheduling of girls' seasons differently from boys' seasons is not a facial gender classification was rightly rejected by the Court of Appeals. Its scheduling is the essence of a facial classification—MHSAA has defined the seasons in which each team will play by the sex of the team's members. Neither logic nor precedent supports MHSAA's claim that because the scheduling of seasons is one aspect of a separate sex program, it is no longer a facial gender classification.

MHSAA's additional contention that *VMI* stands for the proposition that separate-sex programs violate equal protection only if the programs as a whole are substantially unequal misreads the case and is equally meritless. If a plaintiff challenges an entire program, the court will examine the entire program. If a plaintiff challenges only one aspect of a program, that is all that a court need examine. The nature of the rest of the program will not change the analysis. See, *e.g.*, *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). Under the heightened scrutiny standard, the defendant must show that the particular sex-based classification that is challenged has an exceedingly persuasive justification and is substantially related to the achievement of important governmental objectives.

MHSAA put the boys in the seasons that they and their coaches wanted and gave the girls the leftovers. The courts

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applied to gender discrimination cases brought pursuant to the Michigan Civil Rights Act would be altered accordingly." *Id.* at 187 n.4.

below properly found that the girls were harmed by MHSAA's actions, and that it had not met its burden of justifying them under the Equal Protection Clause. MHSAA's claims below that its actions were justified because of the benefits of playing in nontraditional seasons are particularly unconvincing in light of its strenuous resistance during the near decade it has litigated this case to conferring these "benefits" on boys.

The Sixth Circuit's decision in no way conflicts with the decisions of this Court or those of other courts of appeals. This case thus presents a routine application of this Court's legal standards governing equal protection to record facts that are unique and unlikely to recur, and this Court's review is unwarranted.

Finally MHSAA's argument that the § 1983 claim is displaced by Title IX—improperly made for the first time in MHSAA's 2005 petition for certiorari to this Court—is also irrelevant to the outcome here.[3] If § 1983 were ousted by Title IX, plaintiffs would nonetheless prevail because the district court found, and all members of the Sixth Circuit panel agreed, that MHSAA violated Title IX and state law. In any event, the Sixth Circuit correctly found that Congress did not intend Title IX, which provides no express private remedy let alone a comprehensive private enforcement scheme, to displace plaintiffs' constitutional right to equal protection enforced under § 1983. No other court of appeals has yet had the opportunity to reconsider its decision on the relationship between Title IX and § 1983 in light of *Rancho Palos*.

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[3] MHSAA also petitioned for certiorari in 2000, seeking interlocutory review of the denial of its motion for summary judgment. That petition was denied.

STATEMENT OF THE CASE

1. Since the 1920s, MHSAA has supervised and controlled interscholastic athletics in Michigan. In this role, it regulates almost every aspect of sports in the state, including the area most pertinent to this case—the season in which each sport will be played. Pet. App. 76a-82a. When MHSAA began to sanction and regulate sports for girls in the 1970s, it followed the above "boys-first" philosophy and scheduled the girls' seasons in the months when boys were not playing. See *id.* at 83a-84a (statement by MHSAA's Executive Director that "'Boys' sports were in [MHSAA member] schools first and girls' sports, which came later, were fitted around the pre-existing boys' program'") (alteration in original). This philosophy also extended to sports that were contemporaneously sanctioned for boys and girls, such as soccer. *Id.* at 83a.

As a result, MHSAA now schedules the seasons for all twelve boys' sports it sanctions during the traditional or most advantageous times of the year, while it schedules six girls' sports during nontraditional or disadvantageous times that are harmful to girls. Specifically, while MHSAA schedules boys' basketball in the traditional, advantageous winter season along with every other state and college in the nation, it schedules girls' basketball in the fall season. It schedules boys' soccer in the traditional fall season, but girls' soccer in the spring. It schedules boys' tennis in the traditional spring season, but girls' tennis in the fall. It schedules boys' swimming in the traditional winter season, but girls' swimming in the fall. It schedules boys' golf in the fall, but girls' golf in the spring.[4] And it is the only state athletic association in the nation that

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[4] While MHSAA previously scheduled boys' golf in the traditional spring season, it moved the boys to the fall season in 1975 because it is easier to obtain tee times and better courses in the fall due to weather conditions. When MHSAA began sanctioning girls' golf, it set spring as their season, having previously determined that it was less advantageous. Pet. App. 55a.

schedules girls' volleyball in the winter instead of the traditional fall season. Pet. App. 52a-56a.

MHSAA was aware that its "boys-first" scheduling negatively affected girls' athletic opportunities and that it could be held legally liable for this discriminatory treatment. Indeed, in the early 1990s, MHSAA studied changes to its scheduling of seasons "'mostly to do what is needed for girls, but also in part to keep the MHSAA in a position of choosing its future voluntarily rather than being forced to fight legislated or court-ordered changes in the future if something is not done soon.'" However, it made no changes. Pet. App. 87a.

2. Plaintiffs Communities for Equity (an organization founded by parents and students to promote gender equity in athletics) and individual parents on behalf of their daughters sued MHSAA in 1998. They alleged that MHSAA discriminates against girls in numerous ways, including the scheduling of sports seasons, in violation of (1) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (as enforced through 42 U.S.C. § 1983); (2) Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 *et seq.*); and (3) the Elliott-Larsen Civil Rights Act of Michigan state law (M.C.L.A. § 37.2301 *et seq.*). Specifically, plaintiffs alleged that MHSAA required females but not males to play sports in nontraditional or disadvantageous seasons; operated shorter athletic seasons for girls for certain sports; scheduled girls' competitions at times and places inferior to those for boys; provided, assigned, and operated inferior athletic facilities for girls to use for MHSAA-sanctioned games; and allocated more resources to the support and promotion of boys' interscholastic athletic programs. See Complaint, June 26, 1998. Before trial, the parties settled all claims through a court enforced Consent Decree, except the one involving seasons.

In December 2001, after a trial in which the United States participated as litigating amicus in support of the plaintiffs,

the district court ruled in favor of plaintiffs on all three legal claims. The district court's ruling spans almost 100 pages, over 30 of which detail findings of fact about the multiple and significant harms girls suffer as a result of MHSAA's discriminatory scheduling of seasons. Pet. App. 88a-126a. For example, the court made factual findings that Michigan girls: (1) lose opportunities to be recruited by college coaches and receive athletic scholarships; (2) lose opportunities to participate in Olympic Development Programs and national club sport programs (*e.g.*, female volleyball players lose 16-20 months of club playing time over a four-year career); (3) have shorter seasons in some girls' sports by as much as 21 days (resulting in less practice time, skill development, and coaching); (4) lose opportunities to participate in special events like March Madness and fall blue-chip basketball shoot-outs; (5) miss out on national publicity, rankings, and All-American honors; (6) lack contemporaneous college and professional role models; (7) cannot compete against teams in neighboring states, which could lessen travel burdens; and (8) endure psychological harm from being treated like "second-class" citizens, resulting in low self-esteem and low life expectations. *Id.* at 122a-125a.[5]

The district court recognized that the state had an important interest in "[e]nsuring the greatest number of participation opportunities for children in interscholastic sports," Pet. App. 127a, but held that MHSAA had failed to present sufficient evidence that logistical limitations require separate seasons

[5] MHSAA's petition (pp. 6-10) simply repeats its evidence that the scheduling decisions were not disadvantageous or harmful to girls. On pp. 5-6 of its petition, MHSAA also belittles the disadvantages of discriminatory scheduling. But the district court's findings of fact were to the contrary, and these findings support its determination that MHSAA violated Title IX and state law as well as the Equal Protection Clause. This Court does not grant review based on disagreement with a district court's factual findings.

for the sexes to maximize participation. See *id.* at 126a ("MHSAA presented insufficient evidence in all of the sports at issue that logistical concerns could not be resolved if both sexes played in the same season").[6] The court similarly found that MHSAA's argument that Michigan girls preferred the extant seasons was unsupported by the evidence and based on an inadequate and biased post hoc survey. See *id.* at 126a-127a.[7]

Expressly applying the standard set forth in *VMI*, the court found that MHSAA "intentionally treats boys and girls differently by scheduling their interscholastic sports seasons at different times of the year." Pet. App. 142a. The court found that MHSAA's logistics and participation-based objectives were important, but "conclude[d] that the discriminatory scheduling is not 'substantially related' to the achievement of those asserted objectives. The empirical evidence was wholly insufficient." *Id.* at 147a. Further, the court held that "[e]ven assuming that the MHSAA had sufficiently proven this point, that would not justify forcing girls to bear all of the disad-

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[6] MHSAA's petition does not respect this finding of fact. For example, on p. 3, MHSAA states that its scheduling decisions "allow[] schools with limited facilities or coaching resources to avoid resource conflicts and offer a better program to all students." And MHSAA repeatedly claims that its season-scheduling has "been very successful at promoting participation," Pet. 4, although the district court found that Michigan's season scheduling was not a cause of increased participation. *See, e.g.*, Pet. App. 127a ("the Court is not convinced that the MHSAA's scheduling system maximizes participation"); *id.* at 127a-131a (rejecting MHSAA's evidence on this point). Thus, MHSAA's statement (Pet. 25) that it has "[a] schedule designed to maximize overall participation" is contrary to the district court's factual findings.

[7] In its petition (p. 20), MHSAA relies on this survey purporting to show that Michigan girls prefer the disadvantageous scheduling. The district court rejected MHSAA's reading of the survey, *see* Pet. App. 133a; noted that "MHSAA did not offer the testimony of any girl or parent who was in favor of keeping the current seasons[,]"; and found the survey suffered from "design flaws and bias." *Id.*

vantageous playing seasons alone to solve the logistical problems." *Id.* And, the court continued, "the logistics justification smacks of post hoc rationalization for a system that only in the relatively recent past decided that girls were entitled to play sports . . . ." *Id.*[8]

In the alternative, the court found that "[p]laintiffs have demonstrated that female high school athletes are denied the benefits of school athletic programs as a result of the scheduling system of [MHSAA] that they would otherwise enjoy if they were male," demonstrating that Title IX had been violated. Pet. App. 155a-156a. Finally, the court determined that MHSAA's discriminatory scheduling of girls' sports seasons violated Michigan's ELCRA. *Id.* at 159a.

Based on these violations, the district court ordered MHSAA to reschedule its sports seasons in compliance with the Constitution, Title IX, and Michigan state law by the 2003-04 school year. Pet. App. 166a-167a. The district court did not order MHSAA to combine girls' and boys' seasons in any sport, but stated that if MHSAA chose to keep separate seasons, it had to schedule them so that boys and girls equitably share the benefits and burdens of different seasons. *Id.* at 167a.

3. The Sixth Circuit affirmed the judgment on the equal protection claim, "thus finding no need to reach the Title IX and state-law issues." Pet. App. 51a. After holding MHSAA to be a state actor, See *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001), the court

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[8] The trial court did not need to and therefore did not specifically address whether plaintiffs had shown that MHSAA's scheduling policies reflected discriminatory animus towards girls. The finding, however, that MHSAA's explanation for its disadvantageous scheduling for girls was pretextual comes very close to a finding of animus. In combination with other findings (that the boys' golf season was changed after the boys' coaches complained and pointed to its disadvantages, *see* Pet. App. 55a), this finding is strongly indicative of discriminatory animus.

wholly adopted the district court's factual findings, stating that "the district court painstakingly discussed each sport at issue and analyzed why play in the non-traditional season . . . harmed female athletes." Pet. App. 52a. Next, applying this Court's heightened scrutiny standard consistent with *VMI*, the court examined and rejected MHSAA's main argument that separate seasons maximize athletic participation: "The evidence offered by MHSAA . . . does not establish that separate seasons for boys and girls—let alone scheduling that results in the girls bearing all of the burden of playing during disadvantageous seasons—maximizes opportunities for participation. . . . [A] large . . . participation number alone does not demonstrate that discriminatory scheduling of boys' and girls' athletic seasons is substantially related to the achievement of important government objectives." *Id.* at 64a. Thus, the court held MHSAA had not shown that its discriminatory scheduling was substantially related to an important government objective and, necessarily, that it had not provided an "exceedingly persuasive" justification for its discrimination. *Id.* at 65a.

MHSAA filed a petition for certiorari to this Court, seeking review of the decision that it had violated the Equal Protection Clause on two grounds: First, MHSAA argued for the first time that Title IX is the exclusive remedy for its discriminatory conduct in the scheduling of girls athletic seasons.[9] Second, MHSAA argued that if an action for violation of the Equal Protection Clause under § 1983 could be brought for discriminatory scheduling, then plaintiffs had failed to prove such a violation at trial because they had failed to show intentional discrimination. MHSAA did not seek review of the decision that it had violated Title IX or the ELCRA.

This Court granted the petition, vacated the Sixth Circuit's decision, and remanded the case to the court of appeals with

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[9] MHSAA had previously argued that it was not covered by Title IX, but changed its position to make this argument. Pet. App. 32a.

instructions to further consider the case "in light of our opinion in *Rancho Palos*." 544 U.S. 113 (2005).

On remand, the panel unanimously affirmed the trial court's holdings that MHSAA violated Title IX and the ELCRA, as well as the Fourteenth Amendment. Pet. App. 33a, 35a. The panel majority also held that Title IX does not provide the exclusive remedy for MHSAA's discriminatory scheduling decisions. *Id.* at 33a. The court analyzed this Court's decision in *Rancho Palos* and determined that it had not undermined the reasoning of the Sixth Circuit's earlier decision in *Lillard* v. *Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996), holding that a plaintiff's constitutional claims under § 1983 were not displaced simply because the facts also gave rise to a statutory claim under Title IX. *Id.* at 722-23.

Judge Kennedy concurred in the majority's holding that MHSAA's scheduling of high school athletics seasons violates Title IX and the ELCRA, but dissented from the alternative holding that plaintiffs could seek relief for discriminatory scheduling under the Equal Protection Clause, as enforced through § 1983. Pet. App. 38a.

REASONS FOR DENYING THE WRIT

MHSAA's petition raises two issues: (1) whether the Sixth Circuit properly followed this Court's equal protection analysis, and (2) whether Title IX displaces plaintiffs' § 1983 claim. Neither issue is dispositive of this case and neither warrants this Court's review.

I. THE SIXTH CIRCUIT PROPERLY APPLIED EQUAL PROTECTION LAW AS TO WHICH THERE IS NO CONFLICT IN THE COURTS OF APPEALS.

The trial court found and the court of appeals has now affirmed that MHSAA violated not only the Fourteenth Amendment but also Title IX and state law. It thus makes

little sense for this Court to address the equal protection issue raised by MHSAA. Moreover, MHSAA's claim that this case creates a conflict about the legal standards for addressing the constitutionality of gender-based discrimination is without merit. This Court in *VMI* articulated the standard for scrutiny of claims like those at issue, and the Sixth Circuit properly applied that standard to the facts found by the district court after a bench trial. This case, accordingly, does not warrant review.

A. This Case Is Not An Appropriate Vehicle For Resolution of the First Question Presented.

As noted above, in addition to the violation of the Equal Protection Clause, two alternative grounds support the decisions of the courts below in this case. This Court has made clear that when, as here, the outcome of litigation does not turn on the answer to the question presented, the petition for certiorari should be denied. See, *e.g.*, *Smith* v. *Butler*, 366 U.S. 161 (1961). Where alternative grounds exist that support the same result regardless of the Court's decision on the question presented, this Court has declined review. See *Monrosa* v. *Carbon Black Exp.*, 359 U.S. 180, 184 (1959) ("[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation"); see also *Belcher* v. *Stengel*, 429 U.S. 118 (1976) (same).

Deciding the equal protection question presented by MHSAA would not alter the outcome of this litigation because, in addition to holding that MHSAA violated the Equal Protection Clause, the district court held that MHSAA violated both Title IX and Michigan state law.[10] The Sixth

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[10] This Court generally defers to the construction of a state statute given it by the lower courts. *See Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985); *Butner* v. *United States*, 440 U.S. 48, 57-58 (1979) (declining to address state law claim because "federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would

Circuit has unanimously affirmed these alternative holdings. This case is thus a very poor vehicle to address MHSAA's equal protection claim.

MHSAA tries to circumvent the importance of these alternative holdings by suggesting that neither the Title IX nor the ELCRA holding would stand if the courts below misapplied *VMI* in finding a violation of the Equal Protection Clause, but that is not the case. Unequal treatment of girls and boys teams violates Title IX, see 20 U.S.C. § 1681(a); Education Programs or Activities, 34 C.F.R. § 106.31(b), unless that treatment does not disadvantage or harm one sex or the harm is "negligible." *Policy Interpretation*, 44 Fed. Reg. at 71415. Indeed, Title IX's regulations expressly require equitable scheduling of athletic practices and competitions. See, *e.g.*, 34 C.F.R. § 106.41(c)(3); *Policy Interpretation*, 44 Fed. Reg. at 71416; *Title IX Athletics Investigator's Manual* (1990), p. 37. It is undisputed that MHSAA schedules boys' and girls' seasons differently, and the trial court's factual findings are that MHSAA's disparate scheduling is harmful to girls in substantial (*i.e.*, non-negligible) ways. Pet. App. 88a-126a. This proves a Title IX violation, as the courts below found. See also *McCormick ex rel. McCormick* v. *School Dist. of Mamaroneck*, 370 F.3d 275 (2d Cir. 2004) (holding that girls, but not boys, playing in nontraditional season violated Title IX).

In addition, there exists an independent state law ground for the trial court's decision: MHSAA's violation of the ELCRA. Plaintiffs adhere to their long standing argument that since MHSAA did not appeal that holding to the Sixth Circuit, they cannot raise it now. In any event, the Sixth Circuit unanimously affirmed the district court's decision that MHSAA's scheduling of girls' sports violates the ELCRA.

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dispose of comparable issues"); *Bishop* v. *Wood*, 426 U.S. 341, 346 n.10 (1976) (explaining that the Court is hesitant to overrule decisions by federal courts skilled in the law of particular states).

This Court's treatment of the equal protection claim would not determine the question whether the ELCRA was violated, see *Forton*, *supra*; and, as plaintiffs demonstrated to the trial court, MHSAA's practices would be deemed a violation of state law. Pet. App. 159a-162a.

B. The Sixth Circuit's Heightened Scrutiny Analysis Comports With *VMI*.

The Sixth Circuit adhered to this Court's heightened scrutiny analysis in *VMI* and properly concluded that MHSAA's scheduling of girls' sports only in disadvantageous seasons violates the Equal Protection Clause.

In *VMI*, this Court was asked to decide whether Virginia's exclusion of women from the educational opportunities offered by the Virginia Military Institute violated the Equal Protection Clause. In answering this question, the Court reiterated the heightened standard that must be met to justify gender-based classifications:

> Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" [518 U.S. at 532-33 (alteration in original) (internal citation omitted).]

The district court and the Sixth Circuit cited and then carefully applied and followed this Court's analysis in holding MHSAA's discriminatory scheduling of girls' seasons to be unconstitutional. These courts found that MHSAA treats boys and girls differently in the scheduling of their sports seasons and that this disparate treatment harms girls in numerous ways. The courts examined MHSAA's justifica-

tions for the disparate scheduling and held that they had not even been proven, much less that they were exceedingly persuasive and substantially related to important government objectives. Therefore, the courts properly concluded that MHSAA's scheduling of girls' seasons violates the Equal Protection Clause. Pet. App. 146a-147a.

C. This Case Presents No Conflict About the Proper Rule of Law That Applies to Gender-Based Classifications.

MHSAA tries to turn its dissatisfaction with the outcome in this case into a conflict about the appropriate analysis of gender-based classifications, but there is no conflict on this issue.

1. *The Sixth Circuit's Decision Does Not Conflict With This Court's Cases Addressing Sex Discrimination Under the Constitution.*

MHSAA's argument that its scheduling of girls' seasons does not constitute a facial gender classification was rejected by all courts below and is wrong. The scheduling decisions at issue are made by MHSAA explicitly on the basis of the sex of the members of the team, not pursuant to a facially-neutral rule.[11] As the courts below held, it is hard to imagine a clearer facial classification. The Sixth Circuit's decision is

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[11] Plaintiffs do not seek to invalidate the separation of sports teams by sex. Indeed, separate sex sports teams have been held constitutionally permissible in the unique context of athletics. *See, e.g., Haffer* v. *Temple Univ.*, 678 F. Supp. 517, 525 (E.D. Pa. 1987) (separate men's and women's teams are permissible because they "expand substantially the opportunity for women to participate"; "courts have repeatedly observed. . . that separate and equal athletic programs are constitutionally permissible") (citing several cases)); *see also O'Connor* v. *Board of Educ.*, 449 U.S. 1301 (1980) (Petition to Stevens, J., Circuit Justice for the Seventh Circuit, to vacate stay) ("Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete . . . .").

thus in complete accord with this Court's treatment of gender-based classifications. See *UAW* v. *Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991) ("[t]he policy [at issue] excludes women with childbearing capacity from lead-exposed jobs, and so creates a facial classification based on gender").

MHSAA contends that only the initial decision to have separate boys' and girls' teams creates a facial gender classification that is subject to heightened scrutiny. Under this theory, a facial gender classification somehow ceases to be a facial gender classification if it is in a program that separates genders. Thus, if a coeducational high school allowed boys, but not girls, to use its science laboratories, that would be a facial gender classification. But, if a school system had separate boys' and girls' high schools, and only the boys' school had science laboratories, that would not be a facial gender classification. The court of appeals correctly concluded that a facial gender classification does not mutate into something else simply because it is part of a single-gender program.

There is also no conflict between the Sixth Circuit's decision and this Court's cases holding that the Equal Protection Clause reaches only purposeful sex discrimination. Facial gender classifications are, by definition, purposeful. Plaintiffs were thus not required to show a specific intent to harm female athletes, discriminatory animus, malice or other evidence of motive. See *Johnson Controls*, 499 U.S. at 199 ("[w]hether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates"). Rather, MHSAA was obligated—but failed—to show an exceedingly persuasive justification for its classification once plaintiffs showed that MHSAA treated girls differently than boys in ways that caused harm to girls in the scheduling of sports seasons.

MHSAA's argument that *VMI* stands for the proposition that the Equal Protection Clause requires only that programs be substantially equal as a whole in their treatment of males

and females is also meritless. Heightened scrutiny has always been applied to the particular aspect of a program that is being challenged. See, *e.g.*, *Califano* v. *Goldfarb*, 430 U.S. 199 (1977) (provision of the Social Security Act that treated nondependent widows and widowers differently held to deny equal protection); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975) (provision of the Social Security Act that provided fewer benefits to male surviving spouses than to female surviving spouses held to deny equal protection); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (provision of the statute governing benefits for the armed services that treated female dependents of servicemen more favorably than male dependents of servicewomen held to deny equal protection).

As quoted above, *VMI* itself requires the court to "[f]ocus[] on the differential treatment or denial of opportunity *for which relief is sought*." 518 U.S. at 532-33 (emphasis added). Initially, *VMI* focused on women's exclusion from VMI. Then, when the state proposed to establish a new program that purported to offer equal opportunity for women, this Court looked at all the components of that new program. Here, plaintiffs challenged the disparate treatment in the scheduling of sports seasons, and the courts below properly focused on that scheduling.

MHSAA's theory that violations of the law can be excused by focusing on other parts of a program is thus a serious misreading of this Court's precedent. Schools may not avoid heightened scrutiny of a sex-based classification—such as failing to provide any science laboratories in a girls' school while providing them in a boys' school—by pointing to the caliber of the girls' history teachers.

In addition, this case provides an excellent illustration of why MHSAA's overall equality test makes no sense. Plaintiffs challenged MHSAA's discrimination against girls in numerous aspects of their programs, but many of these challenges were settled in a consent decree. See *supra* at 1.

Under MHSAA's theory, plaintiffs would be deterred from settling those aspects of the case that the parties were able to resolve for fear of losing their ability to effectively challenge the disputes that remained.

MHSAA's concern that allowing equal protection challenges to components of separate sex programs will result in lawsuits based on minor differences between programs is misplaced. It is only where, as here, similarly situated girls and boys are classified based on their sex and treated differently and harmfully for reasons that are not substantially related to any important government purpose that a violation of the Equal Protection Clause has been proven. See Pet. App. 30a ("The issue is not whether *any* difference between male and female high school sports is deserving of being classified as a case of disparate treatment. Rather, the issue is whether the seasonal scheduling differences on the basis of gender that result in unequal treatment of women in comparison to men is considered disparate treatment.").

The disparate impact cases MHSAA cites to argue that plaintiffs should have been required to show discriminatory animus are inapplicable because in those cases, the specific conduct challenged was found to be *facially neutral.* For example, in *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979), which challenged veterans' preferences, the Court found that status as a veteran was not a proxy for gender, since some men are not veterans and some women are. In such cases, the Constitution requires a showing of animus to determine "whether the adverse effect reflects invidious gender-based discrimination." *Id.* at 274; see also *Shaw* v. *Reno*, 509 U.S. 630, 649 (1993) (describing reapportionment legislation as race-neutral on its face).[12] In

[12] *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), cited by MHSAA to support its argument that its scheduling of girls' seasons is not a facial classification is also not relevant. Leaving aside the question of whether *Geduldig's* reasoning is still valid, in that case the Court held only that

contrast, the courts below agreed that the conduct challenged here—such as the decision that the girls' basketball season will be in the fall while the boys' season is in the winter—is an explicit classification based on sex.

MHSAA's claim that the Sixth Circuit's decision conflicts with *VMI* thus must be rejected. While MHSAA mischaracterizes *VMI* as deciding that separate but equal programs for males and females satisfy heightened scrutiny,[13] the critical points here are that the state has the burden of showing that challenged programs are substantially related to an important government purpose, and that separate and *unequal* programs for females are unconstitutional. See *VMI*, 518 U.S. at 553 (rejecting alternative program for women established by state because it was a "pale shadow" of *VMI*). The courts below found as a matter of fact that MHSAA's discriminatory scheduling of girls' and boys' seasons was *not* substantially related to an important government purpose. And, because MHSAA's scheduling of girls' seasons is manifestly unequal to its scheduling of boys' seasons for the multiple reasons found by the courts below, the Sixth Circuit correctly held that MHSAA's scheduling is unconstitutional. This decision in no way conflicts with *VMI*.

Finally, MHSAA erroneously claims that the Sixth Circuit deviated from *VMI* by requiring identical, rather than equal, treatment of boys and girls. See Pet. 21, 24. But neither the

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pregnancy-based distinctions were not explicit facial classifications. Here, MHSAA's scheduling decisions explicitly and on their face treat boys' and girls' teams differently.

[13] In fact, the Court did not address the argument that the Constitution permits "separate but equal" educational programming for male and female students. *See VMI*, 518 U.S. at 533 n.7. Noting but not deciding this question in evaluating Virginia's proposed remedy, the Court found instead that the Virginia Women's Institute for Leadership—the program established by the state as an alternative to admitting women to *VMI*—was manifestly unequal to VMI in both tangible and intangible benefits. *Id.* at 534, 547, 551, 557.

district court nor the Sixth Circuit in this case suggested that MHSAA must schedule girls' sports in seasons that mirror the boys' seasons. To the contrary, the district court repeatedly stated that MHSAA could schedule girls' and boys' sports in separate seasons as long as the sexes split advantageous and disadvantageous seasons equitably. See also Pet. App. 167a ("The parties are reminded that Defendant MHSAA may design the new schedule in a number of different ways, and as long as girls and boys share the advantages and disadvantages of the new seasons equitably, the Court will approve the Compliance Plan.").[14]

The trial court held, and the Sixth Circuit correctly affirmed, that in this case, similarly situated girls and boys were classified based on their sex and treated differently and harmfully in the scheduling of athletic seasons for reasons that are not substantially related to any important government purpose. This decision fully comports with this Court's jurisprudence.

2. *The Sixth Circuit's Decision Does Not Conflict With the Decisions of Other Courts of Appeals.*

There is no conflict between the Sixth Circuit's decision and the decisions of the Third, Fourth, Eighth, and D.C. Circuits that MHSAA cites. These cases are all readily distinguishable, and thus do not create any conflict.

First, there is no conflict between the Sixth Circuit's decision in this case and the Fourth Circuit's decision in *VMI*. In trying to demonstrate such a conflict, MHSAA repeats the same arguments it made to show a purported conflict with this Court's decision in *VMI*. Therefore, plaintiffs incorpo-

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[14] MHSAA's petition (p. 5 n.3) suggests that the district court specified a detailed scheduling remedy. In fact, MHSAA was provided an opportunity to design a constitutional schedule. *See* Pet. App. 166a-167a.

rate their responses to MHSAA's arguments. See *supra* at 14-20.

Second, there is no conflict with the Third Circuit's decision in *Vorchheimer* v. *School District*, 532 F.2d 880 (3rd Cir. 1976), *aff'd*, 430 U.S. 703 (1977), which held that a female high school student was not denied equal protection when she was denied admission to an all-male high school, because she could attend an allegedly equal girls' high school. *Vorchheimer* was decided before this Court's amplification of the proper scrutiny for such cases in *Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982), and in any event is distinguishable. Unlike the separate female school that the Third Circuit found equal to the all-male school in that case, MHSAA's scheduling of girls' sports seasons here has been found *unequal* by the district court, a factual finding affirmed by the court of appeals.

Finally, MHSAA relies on three decisions by the Eighth and D.C. Circuits involving equal protection claims by female prisoners alleging discrimination in the provision of educational, employment, and other programs and services. But once again, there is no conflict. Initially, we note that the analysis in these cases (all decided before *Johnson* v. *California*, 543 U.S. 499 (2005)) is affected by this Court's decisions in *Turner* v. *Salfey*, 482 U.S. 78 (1987), and *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987), which held that prison regulations challenged as burdening constitutional rights are subject to only minimal constitutional scrutiny. See, *e.g.*, *Turner*, 482 U.S. at 81.

Moreover, in each of these cases, the relevant facts led the courts to conclude that the female and male inmates were not similarly situated as a threshold matter. Thus, the courts held that the plaintiffs in those cases did not have viable equal protection claims. See, *e.g.*, *Klinger* v. *Department of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994) ("[d]issimilar treatment of dissimilarly situated persons does not violate equal protec-

tion"); *Keevan* v. *Smith*, 100 F.3d 644, 647-51 (8th Cir. 1996) (same). In this case, in contrast, female and male athletes in Michigan schools clearly are similarly situated, and thus entitled to equal treatment.

While *Klinger* and *Keevan* also held that there would be no equal protection violations even if the court assumed the female and male inmates were similarly situated, that was because they found that the prisoners were challenging *facially neutral rules*. See, *e.g.*, *Klinger*, 31 F.3d at 734 (no facial gender classification regarding 24-hour medical care where some male *and* female prisoners are deprived of this service); *Keevan*, 100 F.3d at 651 ("[w]hen attempts are made to compare programs offered at facilities housing inmates who are not similarly situated, 'it is hardly surprising, let alone evidence of discrimination, that the smaller correctional facility offered fewer programs than the larger one"). Here, both courts below rightly concluded that MHSAA's scheduling decisions facially classify athletes by gender. See Pet. App. 1a-2a.

Women Prisoners of the District of Columbia Department of Corrections v. *District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), is similarly inapposite. In that case, too, the court found that male and female inmates were not similarly situated. *Id.* at 924-27. In addition, the D.C. Circuit rejected female prisoners' claims that they were entitled to the *identical* programs offered to male prisoners. In this case, however, the court found that MHSAA's scheduling decisions treated boys and girls differently on their face, and that these differences resulted in significant harm to girls and were not substantially related to any important government interest.

In *VMI*, this Court made clear that a gender-based classification must be justified under the heightened scrutiny standard set forth in that case. In light of this Court's decision, there can be no conflict among the courts of appeals on this issue, and there is not.

II. THE COURT SHOULD NOT ADDRESS WHETHER TITLE IX IS THE EXCLUSIVE REMEDY FOR PLAINTIFFS' INJURIES IN THIS CASE.

A. This Case Is Not An Appropriate Vehicle To Address This Issue.

Plaintiffs do not dispute that when this Court decided *Rancho Palos*, there was a conflict among the courts of appeals on the question whether Title IX is the exclusive remedy for gender discrimination in athletic programs of federal fund recipients. This case, however, is the first to address the question since this Court decided *Rancho Palos*. Other courts of appeals have not yet had a chance to determine whether the directive of *Rancho Palos*—that § 1983 claims should be foreclosed only where there is compelling evidence of congressional intent to restrict plaintiffs to the remedies provided in the violated statute—requires a new analysis of the question whether Title IX provides the exclusive remedy for gender discrimination in this setting. It remains to be seen whether *Rancho Palos* will smooth away the conflict among the circuits on the issue.

In any event, for several additional reasons, this case should not be utilized to resolve the conflict that pre-existed *Rancho Palos*.

First, during nearly seven years of litigation, MHSAA never mentioned, let alone pressed, the question of whether Title IX provides the exclusive remedy for plaintiffs' claims. MHSAA's second petition to this Court, filed in 2005, is the first place that this argument arose, despite MHSAA's numerous dispositive motions and its 2000 petition to this Court seeking interlocutory review of a denial of summary judgment.

The reason for this omission is simple: Until it had no alternative litigation strategy, MHSAA consistently asserted

that it was not covered by, and thus did not have to comply with, Title IX. Once MHSAA lost this case at trial and on appeal, it sought an argument to try to bring the case to the attention of this Court. MHSAA decided to abandon its prior position that Title IX does not apply so that it could raise with the Court the conflict among the courts of appeals on the question whether Title IX is the exclusive remedy for gender discrimination in athletics at federally-funded institutions.

Plaintiffs respectfully submit that MHSAA should not be rewarded for this gamesmanship, and should not now be allowed to claim that Title IX is plaintiffs' only remedy, when it repeatedly argued that it was not subject to Title IX in the face of multiple rulings by the district court and Sixth Circuit to the contrary. Rather, these circumstances constitute a further reason why this Court should decline to review the exclusivity question. See *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider an issue raised for the first time in the petition for certiorari and on which petitioner took a contrary position below).

Second, as shown with regard to the equal protection issue, this Court should also decline review of the exclusivity issue because the answer to the question presented will not determine the outcome of this case. See *Monrosa*, 359 U.S. at 183. Deciding the exclusivity question presented by MHSAA would be similarly inconclusive because the district court held, and the court of appeals has affirmed, that MHSAA violated Title IX and Michigan state law. See *supra* at 2, 12-14.

Practices that deny equal opportunities in athletics to one gender violate Title IX, without regard to whether animus towards the disadvantaged gender is shown. See *supra* at 2, 13; see also *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 881 (5th Cir. 2000) ("[the university] need not have intended to violate Title IX, but need only have intended to treat women

differently")[15]. The analysis in athletics cases thus focuses on whether males and females have been provided with equal participation opportunities, benefits, and services. *Cf. Policy Interpretation,* 44 Fed. Reg. at 71413 (describing multiple components involved in assessing Title IX compliance, one of which is scheduling, and stating that "[i]nstitutions will be in compliance if the compared program components are equivalent"). Therefore, even assuming MHSAA were correct that animus is required for violation of the Equal Protection Clause, there is no such requirement under Title IX.

This case is not a suitable vehicle to address whether Title IX is plaintiffs' exclusive remedy.

B. Title IX Does Not Provide the Exclusive Remedy for Plaintiffs' Claims.

MHSAA's argument that Title IX displaces plaintiffs' constitutional claim is, in any event, without merit.

This Court has made it clear that § 1983 is available as a remedy except in very narrow circumstances, none of which applies to Title IX. The Sixth Circuit reached the correct result using the analysis required by this Court in *Rancho Palos* and the cases upon which it relies, *Middlesex County Sewerage Authority* v. *National Sea Clammers*, 453 U.S. 1 (1981), and *Smith* v. *Robinson*, 468 U.S. 992 (1984), *superseded by statute*, Handicapped Children's Protection Act, 20 U.S.C. § 1415(e)(4)(B) (1985). As *Rancho Palos* explains, federal rights are presumptively enforceable under § 1983; this presumption may be defeated only in exceptional cases by showing that Congress intended to preclude § 1983 enforce-

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[15] Contrary to MHSAA's argument, the "intentional discrimination" discussed in *Pederson* is not the "animus" that is required to show a violation of the Equal Protection Clause for a neutral classification. That court's discussion of the archaic views of the university were not essential to its holding that the university had violated Title IX by not accommodating the interests of its female students in having more athletic teams.

ment. Evidence of congressional intent "may be found directly in the statute creating the right, or inferred from the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Rancho Palos*, 544 U.S. at 120 (quoting *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997)). But *Rancho Palos* instructs that a § 1983 action is foreclosed only where there is clear congressional intent to restrict plaintiffs to the set of remedies that are available under the violated statute itself.

This is a demanding standard. In *Rancho Palos*, the Court barred reliance on § 1983 to enforce the Telecommunications Act of 1996 ("TCA") based on the detailed "scheme of expedited judicial review and limited remedies created by [the TCA itself]." 544 U.S. at 122-23, 127. That scheme mandates that judicial review be sought within 30 days of agency action and requires that the case be heard and decided on an expedited basis; it likely excludes compensatory damages and excludes attorneys' fees and costs; and the legislative history suggests that Congress intended the TCA to be an exclusive remedy. *Id.* at 129-30 (Stevens, J., concurring); See also *Smith*, 468 U.S. at 1011-1012 (foreclosing § 1983 action because it would "render superfluous" detailed procedural protections in statute and would frustrate Congress' view that needs of handicapped children are best met through parents and local education agency working together); *Sea Clammers*, 453 U.S. at 20 (foreclosing § 1983 action because statutes "contain unusually elaborate enforcement provisions, conferring authority to sue . . . both on government officials and private citizens").

The Sixth Circuit correctly applied *Rancho Palos* to conclude that Title IX does not provide the exclusive remedy for plaintiffs' claims. First, Title IX contains no express private remedies at all, and certainly has no restrictive remedies suggesting that Congress intended to preclude § 1983 enforcement. See *Rancho Palos*, 544 U.S. at 121 ("[w]e have found

§ 1983 unavailable to remedy violations of federal statutory rights in two cases: *Sea Clammers* and *Smith*. Both of those decisions rested upon the existence of more restrictive remedies provided in the violated statute itself.") (emphasis added); Pet. App. 22a (*Rancho Palos* "extend[s] only to statutes that contain an explicit private remedy that is sufficiently comprehensive . . . to infer that Congress intended the remedy to be exclusive") (emphasis added). Indeed, it was the absence of either a private remedy or a comprehensive enforcement scheme that led the Supreme Court to imply a private right of action to enforce Title IX. See *Cannon* v. *University of Chi.*, 441 U.S. 677, 705-706 (1979); see also *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992) (finding private right of action for money damages under Title IX because administrative process would leave complainant "remediless").

Second, the availability of a private judicial remedy does not establish congressional intent to preclude § 1983 relief in any event. See *Rancho Palos*, 544 U.S. at 122 (refusing to adopt United States' position that availability of private judicial remedy conclusively establishes intent to preclude § 1983 relief); *ASW* v. *Oregon*, 424 F.3d 970, 977-78 (9th Cir. 2005) (citing *Rancho Palos* in holding that statute's provision of private judicial remedy does not establish intent to preclude § 1983 action and relying instead on statute's lack of comprehensive enforcement scheme), *cert. denied*, 127 S. Ct. 51 (2006). Rather, the question is whether the statutory scheme is "unusually comprehensive and exclusive" such that congressional intent to foreclose a § 1983 remedy can be inferred. *Rancho Palos*, 544 U.S. at 131 (Stevens, J., concurring).

Title IX does not meet this rigorous standard. The sole enforcement mechanism expressly authorized in the statute is the withdrawal of federal funds. 20 U.S.C. § 1682. While individuals may file administrative complaints, they are not

allowed to activate or participate in the investigation and are not entitled to individual relief. *Cannon*, 441 U.S. at 706-08 & n.41. This is not the kind of comprehensive enforcement scheme that this Court has held sufficient to foreclose a § 1983 action. Nor does Title IX's legislative history indicate that Congress intended to establish Title IX as an exclusive remedy for sex discrimination. See *Smith*, 468 U.S. at 1009-1012 (relying in part on statute's legislative history in foreclosing § 1983 action); *Blessing* v. *Freestone*, 520 U.S. 329, 346 (1997) (defendants must show congressional intent to preclude § 1983 claim).

Equally to the point, *Rancho Palos* and *Sea Clammers* are distinguishable from the instant case because they involved plaintiffs seeking to enforce federal *statutory* rights through § 1983. Plaintiffs here invoke § 1983 to enforce independent constitutional rights to equal protection. Although the plaintiffs in *Smith* sought to enforce their constitutional rights under § 1983, this Court found it critical that their § 1983 claims were "virtually identical" to their statutory claims (in addition to finding that Congress established a comprehensive enforcement scheme in the statute at issue). *Smith*, 468 U.S. at 1009. By contrast, plaintiffs' constitutional and statutory claims here are not identical for many reasons, including: (1) Title IX covers only entities receiving federal funds, while § 1983 covers all state actors; (2) conditions that violate the Constitution may not violate Title IX, see, *e.g.*, *Mississippi Univ. for Women*, 458 U.S. at 732-733 (striking down female-only nursing school policy under Equal Protection Clause, while noting that it might not violate Title IX); and (3) § 1983 allows recovery against individuals, see *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), while most courts have held that Title IX does not. See, *e.g.*, *Lipsett* v. *Univ. of P.R.*, 864 F.2d 881, 901 (1st Cir. 1998) (damages under Title IX may be available only from educational institutions, not individuals). Moreover, in *Smith*, this Court was concerned that allowing a § 1983 action would provide plaintiffs with access to attor-

neys' fees, which were specifically omitted from the detailed remedial provisions of the statute at issue. [16] No such concern is present here.

Three circuits have held that Title IX precludes recovery under § 1983, but it is these courts, not this Court, that should revisit their precedent. Those decisions preceded, and do not reflect, the directive of *Rancho Palos*—that § 1983 claims are to be foreclosed only where there is compelling evidence of congressional intent to restrict plaintiffs to the remedies provided in the violated statute. For the reasons set forth above, Congress has manifested no such intent with regard to Title IX. Moreover, no court of appeals has relied on *Rancho Palos* to foreclose a § 1983 claim. The only circuit to address *Rancho Palos* authorized the § 1983 action to proceed. See *ASW* v. *Oregon*, 424 F.3d at 977-78 (availability of administrative review mechanisms and private judicial remedy does not preclude § 1983 action because statute lacks comprehensive enforcement scheme).

III. IN LIGHT OF THE DECISIONS BELOW, THE PETITION DOES NOT PRESENT ANY LEGAL ISSUE OF NATIONAL IMPORTANCE.

Given the factual findings of the decisions below, which simply apply this Court's established equal protection jurisprudence, MHSAA's petition does not present for this Court's review any issue of national importance. In fact, the only issue actually presented involves the application of *VMI* to the facts of this case—facts that are unique and unlikely to recur. Indeed, the underlying substance of the case is no longer of national importance, because, to plaintiffs' knowledge, MHSAA is the only state high school athletic associa-

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[16] Congress promptly responded to the ruling by amending the statute to more expressly state that it did not intend the statute at issue to displace any other remedies. *See supra* at 25.

tion in the nation that still schedules girls but not boys in disadvantageous athletic seasons.[17]

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel

MARCIA D. GREENBERGER
JOCELYN F. SAMUELS
DINA K. LASSOW
NEENA K. CHAUDHRY
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180

KRISTEN GALLES
Counsel of Record
EQUITY LEGAL
10 Rosecrest Avenue
Alexandria, VA 22301
(703) 683-4491

H. RHETT PINSKY
PINSKY, SMITH, FAYETTE & KENNEDY
1515 McKay Tower
Grand Rapids, MI 49503
(616) 451-8496

Counsel for Respondents

February 28, 2007

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[17] MHSAA claims, without citations, that girls' participation dropped when other states changed their athletics seasons. Just as the Court should not rely on the statement that MHSAA's scheduling of girls' sports in nontraditional seasons increased participation when that claim was expressly rejected by the district court, *see* Pet. App. 127a-131a, the Court also should not rely on MHSAA's claims about participation rates in other states when it cites nothing in support of its claims, let alone any record evidence or factual finding of the court below.

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No. 06-1038

In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
PETITIONER,

v.

COMMUNITIES FOR EQUITY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

EDMUND J. SIKORSKI, JR.
EDMUND J. SIKORSKI, JR., P.C.
3300 WASHTENAW AVENUE
SUITE 240
ANN ARBOR, MI 48104
(734) 677-2110

WILLIAM M. AZKOUL
WILLIAM M. AZKOUL, P.C.
161 OTTAWA AVENUE N.W.
SUITE 205-C, WATERS BLDG.
GRAND RAPIDS, MI 49503
(616) 458-1315

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
ALEXANDER MALTAS
LATHAM & WATKINS LLP
555 11TH STREET N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

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ARGUMENT

1. Respondents forthrightly endorse the Sixth Circuit's erroneous standard for presuming an intent to discriminate, and they have no persuasive response to the central point made by MHSAA, *amici*, and the Third, Fourth, Eighth, and D.C. Circuit decisions cited in the petition: that day-to-day decisions implementing the details of single-sex programs do not themselves classify anyone by gender.

The Equal Protection Clause is violated only by intentional discrimination—disadvantages imposed *because of*, not merely *in spite of*, race or sex. Respondents assert that "the scheduling decisions at issue are made by MHSAA explicitly on the basis of the sex of the members of the team." Opp. 15. Respondents seem to believe that if the teams are divided by sex, then any scheduling decisions are necessarily made "on the basis of the sex of the members of the team." To the contrary, it should have been their burden to *prove* that MHSAA selected the schedules it did *because of*, not merely *in spite of* the sex of the teams. Once the teams are separated by sex, *any* mechanism to assign schedules (including a coin flip) will produce advantages and disadvantages that are perfectly correlated with the sex of participants. But that does not mean that advantaging or disadvantaging girls was the *purpose* of the decision. A preference for veterans is not automatically discrimination, even though veterans are overwhelmingly men. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 274-75 (1979). Similarly, a better schedule for the blue team than the red team is not necessarily intentional sex discrimination, even if everyone on the red team is male and everyone on the blue team is female. "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

This Court has held that "[c]ertain classifications ... in themselves supply a reason to infer antipathy." *Feeney*, 442

U.S. at 272. If a policy says, on its face, that new uniforms will go to boys first, then it explicitly classifies by sex and no further inquiry is necessary to determine that the boys got the new uniforms *because they are boys*. But if a principal simply purchases new uniforms for one team that happens to be all boys, the reason might not be sex at all; it might be because it has been longer since they got new uniforms, or simply because of a coin flip. To justify a conclusive presumption of discriminatory purpose, something on the face of a policy or statute must show that the policy or statute *itself* is classifying by race or gender.

Respondents argue that "if a school system had separate boys' and girls' high schools, and only the boys' school had science laboratories," that difference in science facilities would be a facial classification even if the separation of the schools by sex were unchallenged. Opp. 16. But the fact that a high school lacks a science lab does not classify anyone by sex, or otherwise conclusively establish that the school board intended to treat students differently *because of their sex*. Perhaps the girls' school is newer, and reflects the district's recent conclusion that science labs are a poor use of facilities or instructional time at the high school level. Perhaps the facility without science labs is also more convenient to a local women's college from which the girls' school will draw frequent guest instructors.

The only reason Respondents' hypothetical has any intuitive appeal is that it is hard to imagine any good reason for a high school not to have science labs, so the example edges perilously close to the *Shaw v. Reno* principle that a simple distribution of benefits and burdens may require an inference of discriminatory intent, even in the absence of any explicit classification, if that distribution is "so bizarre as to permit of no other conclusion." 509 U.S. 630, 646 (1993). But the facts of *this* case do not come close to that line. A decision to schedule the girls' basketball tournament in fall (endorsed by the member schools and numerous witnesses, including the University of Michigan head women's basketball coach) is not so bizarre that it simply

must have been the product of discriminatory intent.

What if, instead of science labs, the alleged "advantage" was that the boys' school had a chemistry teacher with a masters degree? A chemistry teacher regarded as more talented? A gym built more recently with more comfortable bleachers? A great sewing program whereas the girls' school has a better wood shop? Respondents' reasoning, and that of the Sixth Circuit, is that *any* difference between single-sex facilities or programs is a facial classification from which discriminatory intent must be presumed. The Sixth Circuit tried to temper the breadth of that error by claiming that differences are only facial classifications if they "result in unequal treatment." Pet. App. 30a. But that supplies no limiting principle at all. Someone can always claim that a difference is unequal for some reason, as illustrated by the district court's extensive and subjective analysis of the advantages and disadvantages of playing these sports in particular seasons. The relevant inquiry is not whether a particular difference is better or worse, but whether it supplies a basis for presuming, without any other proof, that the defendant made a deliberate decision to allocate benefits *because of*, not merely *in spite of*, the sex of the recipients. The Sixth Circuit's standard does not address that question at all, and the result is that the lower courts have completely relieved the plaintiffs of their burden of proof.

2. Neither of the courts below ever found that MHSAA chose the schedules it did because of, not merely in spite of, any disparate impact by sex—and the record does not contain evidence from which any reasonable factfinder could reach that conclusion. Respondents' only argument (and the courts' only holding) has been that no proof of intent is necessary, because discriminatory purpose is presumed.

The record is full of testimony that MHSAA's current schedules provide the best alternative for the greatest number of female athletes. The University of Michigan head women's basketball coach testified that MHSAA's schedule is "more convenient" for recruiting and provides "more visibility for Michigan's girls to be recruited." Pet.

App. 94a. Kathy Lindahl, the former associate athletic director at Michigan State, testified that she had "a passion for girls and women in sport," and had "dedicated basically my whole career and life" to girls' athletics, and believed the current schedules provide "an advantage" for all students. CAJA 4435-36. Several girls' coaches testified that "the girls programs are flourishing a lot more than the boys," CAJA 4646, the "current alignment of seasons allows us to have two to three times more matches than most other states," CAJA 4513, and "in the 13 years I've been coaching the girls, the participation for girls has more than doubled." CAJA 4604. The district court disagreed with that testimony and found that, in its opinion, the current schedules in these six sports are net disadvantageous to girls. The court never found, however, that MHSAA chose these schedules *because it believed* they would disadvantage girls. The evidence of good faith disagreements makes that conclusion impossible.

The district court and Sixth Circuit did observe that, in their opinion, the girls were forced to bear "all of the burden of playing during disadvantageous seasons" among the six sports examined. Pet. App. 64a. MHSAA sponsors tournaments for girls only in 14 sports and another 14 tournaments for boys in which girls may compete.[1] CAJA 2004. Respondents picked these six particular girls' sports to focus on, but neither they nor the courts below ever attempted to evaluate the *overall* programs to determine whether girls have been forced to bear all, or even an unfair proportion, of the discretionary decisions that might be termed "disadvantageous."[2] (And even among these six,

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[1] The petition indicated that girls may play on boys' teams only where there is no parallel girls' team. In fact, girls may (and do) play on any boys' team. CAJA 2004 (text of rule does not exclude girls from any tournament). For example, last year 104 girls played on boys' tennis teams, and 193 girls played on boys' wrestling teams. *See* participation figures at http://www.mhsaa.com/resources/administration.htm.

[2] The district court's suggestion in the remedial context that it would accept as a remedy any distribution of seasons *in these six sports* that it

boys are not offered volleyball at all; the district court found that the girls' volleyball seasons were "discriminatory" by comparing them to the seasons used by girls in other states). The courts below certainly did not infer discriminatory intent from any suspicious pattern of decisionmaking, and could not have on this record. The point of their reasoning was that no inference or proof of intent is necessary, because the decisions here qualify as "facial classifications."

Neither could any presumption of discriminatory intent be based on the evidence that MHSAA sought to minimize overall disruption of the pre-existing tournaments when it began adding new tournaments for girls in 1972. When girls' tournaments were added over time, MHSAA was entitled to take into account both that putting the tournaments at the same time would create resource conflicts in certain sports, *and* that moving the existing boys' tournaments around each time a girls' tournament was added would disrupt the overall program. *See, e.g.*, Tennis Coaches Ass'n Br. 2 (moving seasons can force students to choose between two favorite sports they have been playing for years). Both are entirely gender-neutral considerations relating to logistics and administrative convenience. At the time each tournament was added there were ample, gender-neutral reasons for scheduling them this way, including (as Respondents themselves have advocated) ensuring there were adequate opportunities for girls during each season. For example, when MHSAA added a girls' basketball tournament in 1972, many schools were already scheduling their girls' teams in the fall. CAJA 4233. The fall created fewer resource conflicts than if the seasons were wedged together, and MHSAA reasonably concluded there was nothing outweighing the massive disruption that would occur to *both* genders if the seasons were shuffled.[3]

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regarded as "equitable," *see* Opp. 9, 20, suffers from the same flaw. Indeed, the district court rejected MHSAA's first compliance plan and ordered the basketball and volleyball seasons switched. CAJA 1856-58.

[3] Neither the Blue Star nor Nike shoot-outs even existed in 1972, and the NCAA "March Madness" was just beginning to develop popularity.

MHSAA has also repeatedly polled its member schools to gauge their willingness to incur these disruptions, and the schools have repeatedly voted in favor of the current seasons. *See* Pet. 3. Implementing the votes of its member schools is another gender-neutral basis for decision.

Respondents claim that MHSAA is attacking the district court's findings. Opp. 7 n.5. MHSAA's point is that those findings answer the wrong question, as a matter of law. The district court made subjective "findings" about the best time to play sports, deciding for example that it is better for some sports to start in warm weather and end in cold, and in other sports the opposite. Some of those findings are indefensible on their own terms, *see, e.g.*, Tennis Coaches Ass'n Br. 4, but more importantly these issues are legally relevant *only* to the extent they might shed some light on MHSAA's intent. The district court never made *any* finding on the only issue that matters: whether MHSAA scheduled the tournaments as it did because of, not merely in spite of, the sex of the teams. Its subjective disagreement with the University of Michigan women's basketball coach about the best time to play basketball is barely relevant to the actual legal issues here.[4]

3. Other circuits have correctly placed the burden on plaintiffs in cases like this one to prove discrimination.

Respondents claim that in the Eighth and D.C. Circuit prison cases the plaintiffs were challenging "facially neutral" rules. Opp. 22. The plaintiffs in those cases did not think so; they argued that differences in programs between men's and women's prisons were facial classifications. The circuit

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Regardless, high school educators are entitled to design their athletic programs to serve *educational* goals, such as maximizing participation and minimizing resource conflicts. It is not discrimination if MHSAA concludes those goals are more important than shoe company shoot-offs.

[4] The district court only found, under an incorrect burden of proof, that MHSAA had not satisfied its burden of demonstrating there were not disadvantages. *See* Pet. 6-10. In any event, the issue is the district court's legal characterizations, not any resolution of disputes of historical fact. *See Grutter v. Bollinger*, 539 U.S. 306, 338-43 (2003) (adopting characterizations different from trial court's conclusions).

courts disagreed, and for exactly the same reason the Sixth Circuit should have reversed here: differences in the boys' and girls' schedules are *not* facial classifications simply because there are separate teams, just as differences in prison programs are not facial classifications simply because there are separate prisons. Scheduling seasons to minimize overall program disruption is no less neutral than allocating prison industries based on the availability of a steady work force. *Keevan v. Smith*, 100 F.3d 644, 651 (8th Cir. 1996).[5]

Both the Fourth Circuit and this Court in *VMI* examined the overall educational experience offered by the two schools. *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995); *United States v. Virginia*, 518 U.S. 515 (1996). The Third Circuit similarly focused only on overall equality in *Vorchheimer v. School District*, 532 F.2d 880 (3d Cir. 1976)—a case on all fours with Respondents' own science labs hypothetical. The Third Circuit held that separate male and female public high schools were constitutional when the "academic facilities [we]re comparable, with the exception of those in the scientific field where [the boys' school's] are superior." *Id.* at 882. As Respondents point out, those cases were challenges to the overall separation, not to specific aspects of the programs. But the cases were litigated that way because only the separation is a facial classification. Neither this Court nor the Fourth Circuit in *VMI* treated each individual difference as a separate facial classification requiring its own "exceedingly persuasive" rationale.

4. The Sixth Circuit's erroneous decision to presume discriminatory intent also requires reversal of the Title IX ruling. The Sixth Circuit's *only* analysis under Title IX was to endorse the district court's conclusion that discriminatory intent may be presumed under Title IX for the same reasons as under the Equal Protection Clause. Pet. App. 32a-33a.

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[5] Respondents attempt to minimize the facial classification holdings by noting that those courts had also found the male and female inmates were not similarly situated. Opp. 21. But those alternative holdings are equally as binding as ones providing the exclusive basis for decision. *See Massachusetts v. United States*, 333 U.S. 611, 623 (1948).

Respondents assert that MHSAA should not be allowed to challenge the Title IX ruling because it previously had argued it was not subject to Title IX. MHSAA did argue that it was not subject to Title IX, but that argument was rejected by the district court. If the courts are going to insist that MHSAA is subject to Title IX, MHSAA is entitled to defend itself under that framework—as the Sixth Circuit recognized by reaching the merits of this issue.

Respondents suggest MHSAA could violate Title IX "without regard to ... animus towards the disadvantaged gender" under a disparate impact theory. Opp. 24. But the district court correctly dismissed all disparate impact claims under Title IX on the ground that such claims are not enforceable in a private suit after *Alexander v. Sandoval*, 532 U.S. 275 (2001). CAJA 935. Respondents did not appeal that ruling. Thus the only Title IX claims remaining *in this case* require proof of intentional discrimination.

Respondents attempt to supply a Title IX analysis that is absent from the opinion below by pointing to regulations regarding the scheduling of practices and games. Opp. 13. But those regulations are relevant, if at all, only because they provide another basis for reversing the Title IX ruling. The regulations (not even cited by the Sixth Circuit) require an evaluation of ten factors, only one of which is "scheduling of games and practice time." 34 C.F.R. § 106.41(c). Even that factor requires analysis of many criteria, and *does not even mention the time of year when sports are played. See* 44 Fed. Reg. 71,413, 71,416 (Dec. 11, 1979).

5. Respondents argue that the state law ruling provides "an independent state law ground for the trial court's decision." Opp. 13. There is nothing "independent" about the Elliott-Larsen Act claim. *Cf. Michigan v. Long*, 463 U.S. 1032, 1039 (1983). Both the district court and the Sixth Circuit correctly recognized it incorporates the federal Equal Protection standard. Pet. App. 165a ("[T]he standard for decision under Plaintiffs' [Elliott-Larsen Act] claim is the same as under their Fourteenth Amendment claim."); Pet. App. 35a (adopting the district court's analysis). That is

entirely consistent with the Michigan Supreme Court's holdings. In *Michigan Dep't of Civil Rights ex rel. Forton v. Waterford Twp.*, 387 N.W.2d 821, 828 (Mich. 1986), the Michigan Court held that Michigan's legislature intended the Elliott-Larsen Act to redress the "concept of discrimination enunciated by the U.S. Supreme Court with respect to equal protection under the Constitution." The court held that "[i]n evaluating whether these classifications by gender amount to impermissible sex discrimination under" the Elliott-Larsen Act, the Michigan Constitution, and the federal Constitution, "the standard to be applied is the same." *Id.* at 829. Reversal of the Equal Protection ruling compels reversal of the Elliott-Larsen ruling as well.[6]

6. The *Sea Clammers* question is squarely presented, is the subject of an acknowledged three-to-three split, and is straightforward: the Sixth Circuit, and two other circuits, have held that the comprehensive private right of action this Court identified in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), is irrelevant to whether Title IX precludes § 1983 claims. But in deciding whether a statute precludes claims under § 1983, "[t]he crucial consideration is what Congress intended." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984). This Court held in *Cannon* that Congress intended to establish a private right of action to enforce Title IX. Pet. 27; *Cannon*, 441 U.S. at 694. And *City of Rancho Palos Verde v. Abrams* confirms that the "ordinary inference" from the existence of a private judicial remedy is that Congress intended it to be exclusive. 544 U.S. 113, 122 (2005).

The Second, Third, and Seventh Circuits have all correctly held that the private right of action recognized in *Cannon* requires application of the *Sea Clammers* doctrine. Pet. 28-29. They have also correctly identified that Title

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[6] Respondents claim MHSAA failed to preserve its challenge to the state claim. Opp. 13. They have been making that argument for over three years, and no court has agreed. It is so specious the panel below did not even mention it when it addressed the state claim on the merits.

IX's statutory regime is inconsistent with parallel litigation under § 1983. *Id.* For example, the prohibition on punitive damages under Title IX, *see Barnes v. Gorman*, 536 U.S. 181, 188-89 (2002), cannot be reconciled with the existence of such damages under § 1983.

This Court is certainly free to grant review only of the intentional discrimination question.[7] But the preclusion question is squarely presented and is the subject of an entrenched circuit split. This Court has the power to review this threshold issue in the course of resolving this case, and there are powerful reasons to do so. *Cf. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985-86 (2005) (deciding threshold issue that had caused "genuine confusion in the lower courts," although "not, strictly speaking, necessary to our disposition").[8]

7. As the amicus briefs attest, Michigan's educational establishment strongly believes the current schedules provide the best athletic opportunities for all students. *E.g.*, Mich. Ass'n Sch. Bds. Br. 5-9. The Sixth Circuit has undermined that judgment as well as a wide range of good faith efforts by educators to promote gender equity. Nat'l Fed. State High Sch. Ass'ns Br. 2. And since "[t]he list of possible distinctions is, quite literally, endless," Alabama Br. 7, the Sixth Circuit has effectively made all single-sex programs presumptively unconstitutional.

CONCLUSION

The petition for certiorari should be granted.

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[7] Respondents' argument that MHSAA has waived its *Sea Clammers* argument is meritless. This Court GVR'd in light of *Rancho Palos Verdes*, which is a *Sea Clammers* case. The Sixth Circuit proceeded to address the *Sea Clammers* issue on the merits. Thus, both this Court and the Sixth Circuit have resolved the waiver argument in MHSAA's favor.

[8] Respondents suggest the split may work itself out following the Sixth Circuit's opinion. Opp. 29. But as the dissent below recognized, *Rancho Palos Verdes's* "ordinary inference" standard makes the case for preclusion even clearer. Pet. App. 46a. There is no reason to think other circuits will change course, and the ruling below strengthens the split.

Respectfully submitted,

EDMUND J. SIKORSKI, JR.
EDMUND J. SIKORSKI, JR., P.C.
3300 WASHTENAW AVENUE
SUITE 240
ANN ARBOR, MI 48104
(734) 677-2110

WILLIAM M. AZKOUL
WILLIAM M. AZKOUL, P.C.
161 OTTAWA AVENUE N.W.
SUITE 205-C, WATERS BLDG.
GRAND RAPIDS, MI 49503
(616) 458-1315

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
ALEXANDER MALTAS
LATHAM & WATKINS LLP
555 11TH STREET N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

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In the
Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Petitioner,

v.

COMMUNITIES FOR EQUITY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE STATES OF ALABAMA, COLORADO, AND TENNESSEE AS AMICI CURIAE IN SUPPORT OF PETITIONER

Troy King
Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record

James W. Davis
Assistant Attorney General

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7401

February 28, 2007

(Additional counsel for amici curiae are listed inside the front cover.)

ADDITIONAL COUNSEL

JOHN SUTHERS
ATTORNEY GENERAL
STATE OF COLORADO
1525 Sherman Street
Denver, CO 80203

ROBERT E. COOPER, JR.
ATTORNEY GENERAL AND REPORTER OF TENNESSEE
STATE OF TENNESSEE
P.O. Box 20207
Nashville, TN 37202-0207

QUESTION PRESENTED

Whether the Sixth Circuit misinterpreted the legal standards governing proof of intentional discrimination in the context of constitutionally authorized single-sex programs, and erroneously determined that Petitioner violated the Equal Protection Clause and Title IX. *See* Pet. at i.[1]

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[1] The petition raises a second question concerning whether plaintiffs' equal protection claim under 42 U.S.C. § 1983 should be dismissed because Title IX's comprehensive remedial scheme is exclusive. *See* Pet. at i. Amici agree with Petitioner's position in that respect, but write here only to express an interest in the first question.

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INTEREST OF AMICI CURIAE

In the decision below, the Sixth Circuit held, in contrast with the Third, Fourth, Eighth, and D.C. Circuits, that any distinction between parallel programs that are themselves validly separated by gender is presumed to be an unconstitutional gender classification subject to heightened equal-protection scrutiny. *Communities for Equity v. Michigan High School Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006). Critically, the plaintiffs did not take issue with the initial decision to establish separate programs for men and women – in this case, separate high school athletic teams. Instead, they challenged Petitioner's subsequent decisions concerning, *e.g.*, when to schedule seasons and tournaments for the different teams. The Sixth Circuit held that all such subsequent decisions are themselves facial gender classifications and, accordingly, that Petitioner had the burden of proving an "exceedingly persuasive justification" for any difference in scheduling the seasons for the boys and girls' teams. That cannot possibly be the law.

The amici States have a keen interest in this case because the Equal Protection Clause and Title IX apply to state governments and their officers. *See* U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); 20 U.S.C. § 1681(a) (prohibiting discrimination "under any education program or activity receiving Federal financial assistance ...."). The Equal Protection Clause, of course, limits the States whenever they place men and women into separate programs or facilities. Courts have applied Title IX to two of the most quintessential and pervasive spheres of operation for state governments: education (*e.g.*, the case below) and prisons (*e.g.*, *Women Prisoners of the District of Columbia Department of Corrections v. District of* Columbia, 93 F.3d 910 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997)).

States are in many cases permitted, advised, or even required to separate men and women, and if the decision below is correct, then States will face a never-ending stream of lawsuits challenging every detail of every single-sex program. Alabama law, for instance, requires corrections officials to provide separate housing for male and female prisoners. Ala. Code (1975) §§ 11-14-13, 14-6-13, 14-6-103. *See also Dothard v. Rawlinson*, 433 U.S. 321, 326 (1977) ("Like most correctional facilities in the United States, Alabama's prisons are segregated on the basis of sex."). So, too, as this case demonstrates, many States sponsor separate athletic teams for men and women, at least in some sports. In fact, Title IX and its regulations expressly permit separate teams for men and women: "[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b).

In the educational realm, a policy debate rages concerning the wisdom of dividing schools or classes by gender. *See, e.g.*, Kristin S. Caplice, *The Case for Public Single-Sex Education*, 18 Harv. J.L. & Pub. Pol'y 227 (Fall 1994); Ashley Elizabeth Johnson, *Single-Sex Classes in Public Secondary Schools: Maximizing the Value of a Public Education for the Nation's Students*, 57 Vand. L. Rev. 629 (March 2004). In *United States v. Virginia*, this Court was "not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females." 518 U.S. 515, 534 n.7 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 720 n.1 (1982)). Accordingly, at least for now, States remain free as a constitutional matter to make the policy choice to provide single-sex public schools or classes. (And, indeed, the U.S. Department of Education recently amended the Title IX regulations to provide schools greater flexibility to offer single-sex classes and extracurricular activities. *See* 34 C.F.R. § 106.34 (revisions effective Nov. 24, 2006).)

The examples go on and on – public restrooms, college dormitories, health care programs geared specifically to one gender, and housing for National Guard units. In each case, States are making constitutionally valid distinctions between the sexes. *See* Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 Wash. U. L.Q. 161, 165 (arguing that even the unadopted Equal Rights Amendment "would coexist peacefully with separate public restrooms, separate sleeping and bathroom facilities for male and female military personnel and prisoners").

As discussed more fully below, in any case where a State decides – legally – to provide separate programs or facilities for men and women, many other decisions regarding implementation will necessarily follow. These subsequent, "downstream" decisions include not only when to schedule the seasons for different sports, but also where to locate prisons and what vocational services to offer there; whom to appoint principal, warden, or coach; which restroom to locate nearest the exit; and many, many like decisions. States and state officials have a compelling interest in not having to come up with an "exceedingly persuasive justification" for each and every such decision. Indeed, the problem is that, in most cases, there simply is no justification that, however sensible and efficient, would satisfy that rigorous standard.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Certiorari To Resolve the Clear Circuit Split Concerning the Appropriate Standard of Review of Decisions Made to Implement Valid Single-Sex Programs.

As the petition persuasively demonstrates, the decision below presents a clear split with other courts of appeals concerning how, when a State constitutionally provides separate programs or facilities for men and women, a court should examine subsequent decisions the State makes to implement those programs. According to

the Sixth Circuit, all subsequent decisions, no matter how trivial, are facial gender classifications and have the same constitutional import as the initial decision to divide men from women. 459 F.3d at 694-95. Therefore, even if a plaintiff challenges only the scheduling of sporting events and not the antecedent decision to schedule the girls' games and the boys' games at different times, the plaintiff is freed of his or her traditional burden to prove discriminatory intent, and the defendant instead must demonstrate an "exceedingly persuasive justification" – when all it may be doing is simply trying to get the most use out of a single gymnasium. *Id.*

Other circuits have taken a more reasonable view, providing a starkly different standard for state actors. As Petitioner points out, in the realm of education, the decision below conflicts with the Fourth Circuit's decision in *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995), in which both the majority and the dissent agreed that the question was whether the men's and women's programs at issue afforded "to both genders benefits comparable in substance, but not in form and detail." *Id.* at 1240; *cf. id.* at 1250 (Phillips, J. dissenting).[2] The decision below likewise conflicts with the Third Circuit's decision in *Vorchheimer v. School District*, 532 F.2d 880, 882 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977), which found single-sex public high schools constitutional when the men's and women's schools were of "similar and of equal quality" – though different (of course) in some respects.

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[2] For the same reason, the Sixth Circuit's decision also conflicts with this Court's decision in *United States v. Virginia*, 518 U.S. 515 (1996). There, both the majority and dissent agreed with the Fourth Circuit that the issue was whether the programs afforded "to both genders benefits comparable in substance, but not in form and detail." *Id.* at 547 n. 17, 553-54. This Court never suggested – in the VMI case or any other – that every difference between the men's and women's schools must independently satisfy heightened scrutiny.

Petitioner also correctly points out the split between the decision below and prison-related decisions from the Eighth and D.C. Circuits. In *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994), *cert. denied*, 513 U.S. 1185 (1995), the court held that just because a woman is sent to women's prison because of her gender, that does not mean that the vocational and educational services she is offered there are so offered because of her gender, even if those programs differ from the ones offered at the men's prisons. *Id.* at 734. The Eighth Circuit correctly distinguished the facial gender classification in the initial decision to separate male and female prisoners from the subsequent gender-*neutral* decisions concerning what programs to offer to which prison. *Id. Accord Keevan v. Smith*, 100 F.3d 644, 649, 651 (8th Cir. 1996) (rejecting a program-by-program comparison, holding that the placement of a particular prison industry at a particular prison is a gender neutral decision, and requiring the plaintiffs to prove a discriminatory purpose).

Similarly, the D.C. Circuit held that in a challenge to programs offered to men's and women's prisons, it need not engage in a detailed "program-by-program" comparison. *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*, 93 F.3d 910, 926-27 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997). The court there held that the plaintiffs could not prevail simply by pointing to any difference in the programs offered and arguing that one is "better" than the other, or even by arguing that the women, in smaller institutions, were offered fewer educational options than the men: In the real world, "[m]ore than that is required." *Id.* at 925-927.

The Eighth and D.C. Circuits have it right. A classification is gender-neutral if "the classification itself, covert or overt, is not based upon gender ...." *Personnel Administrator v. Feeney*, 442 U.S. 256, 274 (1979). The division of prisons by gender is a facial gender classification, but the myriad decisions made in

implementation of that initial (and eminently reasonable) decision to operate dual programs are not. Those subsequent decisions are not ordinarily – let alone necessarily – based on gender at all, and the burden should be on the plaintiff to prove otherwise. The decision below is in direct conflict with this sensible standard.

The Sixth Circuit's decision, then, presents a stark conflict among the courts of appeals and, indeed, is inconsistent with the best understanding of this Court's own equal-protection jurisprudence. What is more, as explained below, the divide in the circuits is not academic or a matter of mere semantics. It has a direct impact on a State's ability to steward scarce resources and to provide important services. In short, it is a split that matters greatly to state officials' day-to-day decisionmaking.

II. The Court Should Grant Certiorari Because This Case Raises Issues of National Importance.

For better or worse, every State in the union spends a substantial portion of its resources on two line-items: prisons and education.[3] Unfortunately, those are two of the areas in which the reasoning of Sixth Circuit has the potential to create the most mischief.

A few examples will illustrate the precarious position in which state officials are placed by the reasoning of the decision below. Consider the position of a corrections official in a State within the Eighth or D.C. Circuits, where the rule is that a complaining inmate must

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[3] A 2002 survey shows that education and corrections expenditures account for a significant percentage of the budget of every U.S. state and territory. *See* 2002 Census of Governments, Table 1: State and Local Government Finances by Level of Government and by State: 2001 – 02, found at http://ftp2.census.gov/govs/estimate/02slsstab1a.xls, and http://ftp2.census.gov/govs/estimate/02slsstab1b.xls (as of February 19, 2007).

demonstrate that a difference in male and female prison programs was in fact motivated by discriminatory animus. The official may learn that her budget allows for the purchase of one new weight machine, and she must then decide whether to place it in the women's prison or the men's prison. She may exercise her discretion and common sense and determine which institution is more in need of an upgrade, where there is greater demand, or other factors. So long as she does not intend to discriminate against men as men or women as women, she can freely make the decision that she is quite certainly more qualified than a federal judge to make.

The same official in the Sixth Circuit, however, will be hamstrung. If she places the new machine in the men's prison, a female prisoner will point to the difference – standing alone – and credibly argue that the men's prison offers "better" weight-room facilities than the women's prison. A male prisoner could, of course, raise the exact same claim if the new machine went to the women's prison. Either way, it will be up to the State to prove that the official had an "exceedingly persuasive justification" for her choice of a weight machine's final destination. That, of course, will not be easy – particularly because, according to the courts below, maximizing opportunities for all prisoners or recognizing differences in demand is not an "exceedingly persuasive justification." 459 F.3d at 694 (rejecting MHSAA's desire to maximize athletic opportunities as a justification for scheduling differences). The safest decision by far – if also the most unfortunate – will be to forego purchasing a new machine at all.

A difference in weight-room facilities is hardly the only distinction that prisoners might point to between a men's prison and a women's prison. The list of possible distinctions is, quite literally, endless. There will always be different wardens with different levels or types of experience. Different correctional officers with different dispositions. Different locales (one will always be nearer the State's population center). Different vocational and educational offerings. Different populations (one is

certain to be more crowded than the other). If the decision below stands, each and every one of these distinctions, in and of itself, becomes the stuff of a constitutional case – for one gender or the other – and imposes upon the State the impossible burden of showing an "exceedingly persuasive justification" for its discretionary management choices.

The problem is no less pressing in the world of education. Petitioners thoroughly discuss the many differences that may exist between the athletic teams that schools field for boys and girls. One team will inevitably have a more experienced coach. Perhaps the teams play in different seasons. And if, for instance, the boy's and girl's basketball teams play the same season, there will be questions about how the two teams will share a school's single gym. If the teams play games on different days, members of one team may argue that the other day is better suited to draw fans. If they play on the same day but at different times of day, one team will complain that more people attend 7:00 p.m. games than 5:00 p.m. games. The problem, of course, is that there is not even conceivably any justification that is "exceedingly persuasive" for scheduling one game at 5:00 and another at 7:00 (at least, none that would apparently "persua[de]" the Sixth Circuit), no matter which team plays when. The programs cannot be identical, so one team or the other – or both – will be able to point to *some* way in which the other team has it "better."

Consider, also, the president of a state university that has a perfectly permissible policy against coeducational dormitories. At the beginning of each school term, he needs to decide which dorms will house men and which will house women. Some, of course, are nicer than others – one might even be brand new. In making assignment decisions, the president might attempt to cluster men's and women's dorms together, or he might try to strike some reasonable balance concerning the dorms' proximity to classrooms and other campus facilities. Common sense suggests that such considerations should justify the

president's decision, but it is not at all clear that they would withstand scrutiny under the Sixth Circuit's reasoning. At the end of the day, one gender or the other will have, on balance, newer, nicer dorms, and that, according to the Sixth Circuit, is a facial gender classification subject to heightened scrutiny.

There is no need to multiply examples. These are just a few of the ways in which state officials will be placed in impossible situations if the decision below stands. The point is that similar problems will arise every time a State provides separate facilities for men and women, be they public restrooms, military barracks, orphanages, etc. Because the separate facilities will never be absolutely identical, a good lawyer will always be able to devise an argument that the other gender's facilities are "better" in some sense, and the burden will then be the State's to show an "exceedingly persuasive justification" for a decision that may have been made, as Petitioner points out, by a "flip of a coin." Impossible.

While some of these examples may seem trivial, there is no principle in the Sixth Circuit's decision that would exclude de minimis differences between programs offered to different genders. Perhaps recognizing the slippery slope its decision sets in place, the Sixth Circuit tries to suggest that trivial differences would be beyond the reach of its holding:

> The issue is not whether *any* difference between male and female high school sports is deserving of being classified as a case of disparate treatment. Rather, the issue is whether the seasonal scheduling differences on the basis of gender that *result in unequal treatment* of women in comparison to men is considered disparate treatment.

459 F.3d at 694-95. The amici States take little comfort in this supposed limitation. As the examples above demonstrate, where there is a difference in two programs, a plaintiff can always argue that the difference results in "unequal treatment" of the genders. That is enough,

according to the decision below, to prove a *prima facie* case of sex discrimination and to require the State to come forward with an "exceedingly persuasive" justification.

The holding casts far too wide a net. Instead, a plaintiff who challenges a difference between comparable programs should be required to prove that the defendant acted with a discriminatory intent (or that the programs are so unequal overall that they are not truly comparable, as this Court decided in the context of the VMI and VWIL programs in *United States v. Virginia*, *supra*.) That rule would not in any way, shape, form, or fashion let government actors off the hook, so to speak. It would not permit discrimination against any person on the basis of his or her gender. It would simply require a plaintiff to prove his or her case and give States the freedom they need to fairly and efficiently administer valid single-sex programs.

* * *

There is one final point worth making. Oftentimes, of course, it will be difficult to tell which, if either, gender is actually "disadvantaged" by a particular policy. Imagine, for instance, that relative to a State's men's prison the women's prison (1) has a more experienced warden and (2) is closer to the population center but (3) has fewer vocational offerings and (4) is slightly more crowded. Who is on the short end of that deal – men or women? Tough to say. Under the Sixth Circuit's rationale, it is entirely possible that male and female plaintiffs will *both* raise complaints.

Of course, under a proper understanding of the Equal Protection Clause, federal courts would never have to grapple with such questions, because the existence of a good-faith disagreement concerning the locus of the "disadvantage" would negate any inference of discriminatory intent. One of the bizarre byproducts of the Sixth Circuit's decision here is that it puts federal courts in the business of deciding which of two groups has, in some objective sense, been "disadvantaged" even

in circumstances where advantage and disadvantage may be entirely debatable and subjective. Worse, from amici's perspective, the Sixth Circuit's decision exposes States and their officials to liability for supposed gender discrimination even when they may actually have thought, in good faith, that they were doing members of the complaining gender a real favor.

It is, then, both the seriousness of the error and the sheer breadth of the decision below that make this a case one of national importance. The Sixth Circuit's rationale presumptively invalidates virtually every decision made by state officials in implementing lawful single-sex programs, including those most common and fundamental to the operation of state governments.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

Troy King
Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record*

James W. Davis
Assistant Attorney General

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401

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No. 06-1038

IN THE
Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

PETITIONER,

v.

COMMUNITIES FOR EQUITY, *ET AL.*,

RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF EQUITY IN ATHLETICS IN SUPPORT OF PETITIONER

LAWRENCE J. JOSEPH
2121 K Street, NW, Suite 800
Washington, DC 20037
Tel: 202-669-5135

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Equity in Athletics, Inc. ("EIA") is a nonprofit corporation dedicated to establishing and preserving equitable, broad-based athletic programs in secondary and postsecondary education.

ISSUE PRESENTED

As relevant to *amicus* EIA, this case presents two significant questions:

(1) Whether the implied private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681-1688 ("Title IX"), displaces or preempts a federal-court action under 42 U.S.C. §1983 for violations of the Equal Protection Clause of the Fourteenth Amendment?

(2) Whether CFE has established the intentional discrimination required to state a claim under Title IX and the Fourteenth Amendment?

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3 of the Rules of this Court, the petitioner has consented to the timely filing of all *amicus curiae* briefs in this matter, and the respondents have consented to EIA's timely filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

Communities for Equity and its co-plaintiffs (hereinafter, collectively "CFE") establish only that scheduling decisions by the Michigan High School Athletic Association ("MHSAA") and by its non-party school members have disparately impacted CFE, without the requisite proof on intentional discrimination. Consequently, the Sixth Circuit erred in upholding the district court decision without proof that MHSAA acted *because of* CFE's gender, rather than merely *in spite of* a disparate impact by gender. With the exception of the initial and non-actionable decision to sponsor gender-separate teams, the rational-basis test applies, and MHSAA readily meets that test.

Although EIA fully supports MHSAA on the merits, EIA respectfully submits that the Sixth Circuit correctly answered this Court's remand on the threshold issue of whether *Sea Clammers* preemption displaces Fourteenth Amendment claims under 42 U.S.C. §1983. Notwithstanding their disagreement on the threshold question's *answer*, EIA and MHSAA fully agree that it is imperative that this Court resolve the circuit split on this question.

By arguing that so-called safe harbors under an administrative "policy interpretation" somehow insulate otherwise-unconstitutional actions from judicial review and redress (Pet. at 27-28), MHSAA has it precisely backwards. At least where a Title IX claim differs from a Fourteenth Amendment claim, the Reconstruction-era statutes clearly allow plaintiffs to proceed. This nation did not fight a civil war and amend its Constitution so that Congress – much less federal bureaucrats – could impose or authorize unconstitutional treatment as a condition of federal funding.

FACTUAL BACKGROUND

Amicus curiae EIA adopts MHSAA's statement of the facts. Pet. at 2-10. In addition, EIA notes that Michigan sports sponsorship for boys lags behind sports sponsorship for girls in several sports played by both genders, including field hockey, volleyball, water polo, equestrian, and gymnastics. *See* National Federation of State High School Associations, *2005-06 High School Athletics Participation Survey,* at 10, 12, 13, 17 (2006) ("*National Federation Survey*").[2]

ARGUMENT

I. TITLE IX CANNOT PREEMPT A FOURTEENTH AMENDMENT CLAIM

MHSAA argues that this Court should resolve the circuit split on Title IX's *Sea Clammers* preemption of §1983 actions. EIA agrees that resolution is imperative, but disagrees with MHSAA's proposed resolution.

Where, as here, a court grants declaratory and equitable relief against conduct for violations of both Title IX and the Fourteenth Amendment, none of the rationales for (or against) preempting an Equal Protection claim under §1983 apply with particular force. Unlike *Sea Clammers,* such cases do not present instances where a specific statute trumps the more ephemeral federal common law. *Middlesex*

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[2] The National Federation Survey is available online at http://www.nfhs.org/core/contentmanager/uploads/2005_06NFHSparticipationsurvey.pdf (last visited Feb. 28, 2007).

County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1, 21-22 (1981). Indeed, Title IX provides essentially the same protection from intentional discrimination and essentially the same relief as §1983 and the Fourteenth Amendment.[3]

Similarly, both Title IX and §1983 actions proceed straight to district court, without administrative exhaustion. *Cannon v. Univ. of Chicago,* 441 U.S. 694, 706-08 (1979); *Smith v. Robinson,* 468 U.S. 992, 1012 & n.14 (1984). Accordingly, unlike *Robinson,* such cases do not present instances where foregoing a statutorily contemplated administrative process short circuits a process that Congress intended to proceed. *Robinson,* 468 U.S. at 1012-13.

In cases such as this, perhaps the best reason for a court to decline constitutional relief under §1983 is that statutory relief under Title IX renders constitutional analysis

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[3] MHSAA's argues that Congress would not have intended §1983's punitive damages to apply to Title IX actions. *See* Pet. at 27. When a state actor violates both Title IX and the Fourteenth Amendment, however, it is difficult to imagine that Congress would have intended its federal funding to somehow provide the federal recipient a "free pass" from otherwise-applicable punitive damages. As to its related argument that such damages should not apply where a recipient complies with Title IX (or at least its regulations), but violates the Fourteenth Amendment, Pet. at 27-28, the "Nuremburg defense" has no place in American law. That said, federal courts retain considerable discretion to decline punitive damages when a state actor relies in good faith on a statutory or regulatory safe harbor that the court finds unconstitutional.

unnecessary. But where a state actor may forego future federal funds to continue its unlawful discrimination, a court reasonably could rule under both Title IX and the Fourteenth Amendment.

As MHSAA suggests in its petition, the best reason to resolve the circuit split is to address those instances where a recipient that ostensibly *complies* with Title IX nonetheless *violates* the Fourteenth Amendment. Pet. at 27-28 (citing so-called safe harbors issued by federal agencies). MHSAA's concern is reasonable: schools understandably want safe harbors to provide safety. MHSAA's example suggests that a state school that intentionally shortchanges its female athletes *because they are girls* nevertheless should escape liability because it *partially* redressed the intentional disparity in a manner sufficient to qualify as a history (however glacial) of program expansion for girls. Pet. at 27-28. While an agency may elect not to enforce a matter within its discretion, it seems doubtful that Congress intended agency action or inaction under 20 U.S.C. §1682 to insulate statutory violations of 20 U.S.C. §1681(a) from judicial review and redress.

Similarly, the current Title IX guidance under this purported safe harbor allows schools to disparately "cap" men's teams, solely to equalize their participation rates down to their enrollment rates. *See, e.g., Neal v. Board of Trustees,* 198 F.3d 763, 765-66 (9th Cir. 1999). As "outright... balancing," that is "patently unconstitutional." *Grutter v. Bollinger,* 539 U.S. 306, 330 (2003). More remarkable than its patent unconstitutionality and more relevant for the issue before this Court, the federal agency in question has not even considered the constitutional issues presented by its own alleged safe harbor:

> [The Department of Education's Office of Civil Rights] does not enforce the Fourteenth Amendment to the U.S. Constitution. Furthermore, because the scope of the Equal Protection Clause of the Fourteenth Amendment may differ from the scope of the Title IX statute, this Additional Clarification does not regulate or implement constitutional requirements or constitute advice about the Constitution.

U.S. Dep't of Educ., Office of Civil Rights, Additional Clarification on Intercollegiate Athletics Policy: Three-Part Test — Part Three, at 1 n.1 (Mar. 17, 2005).[4] In sum, MHSAA's preemption argument would have this Court extinguish the Fourteenth Amendment because a bureaucrat, without much apparent thought, wrote a memorandum.

Notwithstanding its thoughtless unlawfulness, this policy interpretation routinely escapes judicial inquiry. *See, e.g., Kelley v. Board of Trustees,* 35 F.3d 265, 272 (7th Cir. 1994) (plaintiffs' attempted challenge to school's attempt to comply with requirements of safe harbor was impermissible "collateral attack"); *Miami University Wrestling Club v. Miami University,* 302 F.3d 608, 614 (6th Cir. 2002) (same). Neither this Court's jurisprudence nor even Congress' authority prevents federal courts' reaching constitutional issues in cases over which the federal court has jurisdiction. *Robinson,* 468 U.S. at 1012 n.15. For that reason, this

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[4] This "Additional Clarification" is available online at: http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf (last visited Feb. 28, 2007).

Court's should soundly repudiate MHSAA's safe-harbor justification for §1983 preemption.

Where, as here, a federal civil-rights statute provides subject-matter jurisdiction and an independent cause of action for statutory violations, a federal court can reach the constitutional merits under §1983, under the federal Declaratory Judgment Act, or even under Michigan's declaratory judgment rule. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-81 (1978); *Associated Builders & Contractors v. Dep't of Consumer & Industry Services Director*, 472 Mich. 117, 125, 693 N.W.2d 374 (2005). For although 28 U.S.C. §1343(4) and 42 U.S.C. §1988(a) do not elevate Michigan law to an independent federal cause of action, *Moor v. County of Alameda*, 411 U.S. 693, 700-04 (1973), they do allow federal courts to resort to state law, as necessary, to declare the law "not inconsistent with the Constitution... of the United States." 42 U.S.C. §1988(a).

II. MHSAA'S SCHEDULING IS NOT INTENTIONAL DISCRIMINATION

Whether or not the Court finds §1983 to provide a cause of action, this Court can and should take up the merits of both CFE's Title IX and Fourteenth Amendment claims.

A. CFE's Causes of Action Require Intentional Discrimination, Not Mere Disparate Effect

Under both the Fourteenth Amendment and Title IX, intentional discrimination (*i.e.*, discrimination based on gender) means those actions where "the decisionmaker... selected or reaffirmed a particular course of action at least in part *'because of,'* not merely *'in spite of,'* its adverse effects

upon an identifiable group." *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279 (1979) (footnote and citations omitted, emphasis added); *Alexander v. Sandoval,* 532 U.S. 275, 282 & n.2 (2001) ("it is absurd to think that *Cannon* meant, without discussion, to ban under Title IX the very disparate-impact discrimination that *Bakke* said Title VI permitted"). As MHSAA argues, CFE did not establish intentional discrimination.

This Court frequently relies on Title VII precedents where applicable to its Title IX jurisprudence, *e.g., Davis v. Monroe County Board of Education,* 526 U.S. 629, 640 (1999) (*citing Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 82 (1998) *and Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 67 (1986)), and this Court should do so here. Under those precedents, not all disparate treatment is disparate treatment *because of gender,* just as not all harassment is *sexual* harassment.

> Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "*discriminat[ion]*... because of... sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

Oncale, 523 U.S. at 81 (emphasis and ellipses in original, citations omitted). Likewise, the crucial issue for Title IX (or Title VI) is the statutory text, which prohibits all

discrimination *because of gender* (or race), but not all discrimination. If the manifest sexual abuse in *Oncale* nonetheless required a showing that it "actually constituted "*discrimina[tion]*... because of... sex," 523 U.S. at 81 (emphasis and ellipses in original) under Commerce-Clause and Fourteenth-Amendment legislation like Title VII, then there is no question that the failure to satisfy the "because of gender" requirement is dispositive under Spending-Clause legislation like Title IX.[5] *See also Franklin v. Gwinnett County Pub. Schools,* 503 U.S. 60, 74 (1992) ("when a supervisor sexually harasses a subordinate *because of the subordinate's sex,* that supervisor 'discriminate[s]' on the basis of sex" under Title IX) (emphasis added).

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[5] Title VI's legislative history could not state more clearly that Congress adopted Title VI *solely* under the Spending Clause. 110 Cong. Rec. 1527 (1964) ("Title VI is not an exercise of regulatory authority over activities within the States... and its validity rests on the power of Congress to fix the terms on which Federal funds will be made available") (prepared analysis submitted by Rep. Celler when introducing his bill to the House); *see also* 110 Cong. Rec. 6546 ("[Title VI] is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to 'fix the terms on which Federal funds shall be disbursed'") (Sen. Humphrey, *quoting Oklahoma v. Civil Service Commission,* 330 U.S. 127, 143 (1947)). Nothing in Title IX's legislative history distinguishes it from Title VI in this regard. *Davis v. Monroe County Board of Education,* 526 U.S. 629, 637 (1999) ("Title IX was passed pursuant to Congress' legislative authority under the Constitution's Spending Clause"); *id.* at 640 (collecting cases).

B. MHSAA's Scheduling Decisions Do Not Constitute Intentional Discrimination

Gender does not drive MHSAA's scheduling of post-season tournaments for particular sports. As such, CFE's perceived injuries do not amount to statutory or constitutional violations. *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279 (1979) ("'Discriminatory purpose,' however, implies... that the decisionmaker... selected or reaffirmed a particular course of action at least in part *'because of,'* not merely *'in spite of,'* its adverse effects upon an identifiable group") (footnote and citations omitted, emphasis added). At any rate, intermediate scrutiny does not apply to scheduling decisions formed under gender-neutral criteria. *Harris v. McRae,* 448 U.S. 297, 322 (1980) (rational-basis test applies to restrictions on abortion funding). For example, the decision to hold the girls' basketball tournament in the fall and the boys' basketball tournament in the winter does not flow from a single decision to disadvantage girls and to advantage boys. Instead, it flows from three distinct decisions:

1. *Separate Teams:* the decision to sponsor separate boys and girls basketball teams to enable girls to have a chance to participate;

2. *Separate Seasons:* the decision to sponsor those separate teams in separate seasons to allow more teams and more athletes to use the same limited facilities during the course of an academic year; and

3. *Seasonal Allocation:* the decision to schedule new sport seasons around existing team seasons when a new sport is added.

Of these three decisions, only the first qualifies as taken *because of* gender. The second and third undoubtedly have disparate effects on girls and boys in Michigan, but those decisions were taken *in spite of* those effects. To analyze the legal effect of, and the level of judicial scrutiny applicable to, each decision, EIA considers them *seriatim,* then analyzes their collective impact on CFE's federal claims.

1. Separate Teams

No-one seriously disputes the wisdom of schools' sponsoring gender-separate teams. Without gender-separate teams, girls would have little chance to compete in most sports:

> Sport is basically a strength, speed and reaction time activity involving propelling a mass through space or overcoming the resistance of a mass. Physiologically and anatomically you cannot compare highly skilled male and female athletes on these parameters because of the inherent biological differences between the sexes. Men are stronger, faster, have better reaction time and more muscle tissue per unit of body mass. That is why athletic teams and competition are sex separate.

Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association, 558 F.Supp. 487, 496 (D.D.C. 1983) (quoting CFE's expert, Dr. Donna Lopiano), *aff'd* 735 F.2d 577 (D.C. Cir. 1984); *accord Cape v. Tennessee Secondary Sch. Athletic Ass'n,* 563 F.2d 793, 795 (6th Cir.1977) ("It takes little imagination to realize that were play and competition not separated by sex, the great bulk of the females would quickly be eliminated from participation").

Accordingly, the original Title IX regulations allow gender-separate teams, 40 Fed. Reg. 24,128, 24,142-43 (1975) (codified at 45 C.F.R. §86.41(b)); *accord* 34 C.F.R. §106.41(b), notwithstanding the gender-blind nature of that statute. 20 U.S.C. §1681(a). Because athletic competition brings a variety of unquestionably valuable lessons, skills, and other educational benefits to all students, teams separated *because of* gender satisfy the intermediate scrutiny applicable to intentionally gender-based distinctions: namely, that the "the [challenged] classification serves 'important governmental objectives' and that the discriminatory means employed are substantially related to the achievement of those objectives." *See United States v. Virginia,* 518 U.S. 515, 533 (1996). As the Sixth Circuit long ago recognized, without gender-separated teams, girls essentially could not participate in athletics. *Cape,* 563 F.2d at 795.

2. Separate Seasons

Having decided to sponsor gender-separate teams, schools rationally could decide to sponsor the same sports in different seasons to maximize the utility of limited facilities. For example, a single gymnasium goes further with boys and girls' basketball played in different seasons. Under this reasoning, schools do not make the separate-season decision *because of* gender. Standing alone, therefore, the decision to stagger separate seasons does not constitute *discrimination,* much less discrimination *because of gender. Feeney,* 442 U.S. at 279 (1979). But even if it did constitute discrimination, and notwithstanding any disparate impact by gender, schools could justify their actions under the rational-basis test:

> It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless "the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective."

McRae, 448 U.S. at 322 (applying rational-basis test applies to restrictions on abortion funding). Under that test, MHSAA's members unquestionably have a significant interest in increasing the availability of their limited resources to their students, which separate seasons unquestionably serve.[6]

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[6] Assuming *arguendo* that schools' scheduling decisions constitute discrimination, MHSAA's tournament scheduling decisions nonetheless would not. MHSAA schedules its tournaments for the same reason that Willie Sutton robbed banks: "that's where the money is." Pamela S. Karlan, "Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel," 105 HARV. L. REV. 670, 683 (1992). Here, rather than money, MHSAA schedules its competitive tournaments where (or when) the competitors are. It would make little sense for MHSAA to schedule tournaments in seasons in which its members did not sponsor sports. As a matter of Michigan law, MHSAA has no official authority over its members' scheduling decisions. *Kirby v. Michigan High School Athletic Association*, 459 Mich. 23, 39 n.17 (1998).

3. Allocation of Seasons

As the district court and Sixth Circuit both recognized, CFE's major complaint concerns the relative allocation of gender-separate seasons between the gender-separate teams. As both courts recognized, however, "[b]oys' sports were in [MHSAA member] schools first and girls' sports, which came later, were fitted around the pre-existing boys program." *See* 178 F.Supp.2d at 815 (quoting MHSAA publication); 377 F.3d at 506 (same).

In essence, CFE claims a disparate-scheduling injury. Even ignoring MHSAA's rebuttal evidence, a gender-neutral "first-come, first-served" allocation rule simply does not discriminate *because of* gender in the allocation of sports seasons, regardless of any disparate impacts by gender. *Feeney,* 442 U.S. at 279 (preference for veterans not discrimination against women, notwithstanding that more than 98% of veterans were men[7]); *M.L.B. v. S.L.J.*, 519 U.S. 102, 126 (1996) (disproportionate impact, standing alone, does not prove intentional discrimination). Further, courts cannot presume intent merely because a disparate impact is the foreseeable consequence of particular action or inaction.[8]

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[7] Although she failed to state an equal-protection claim, Ms. Feeney nonetheless suffered significantly more disparate impacts under Massachusetts' veteran-preference statute than CFE has suffered under sports scheduling in Michigan. *See Feeney,* 442 U.S. at 260 (district court found that the "absolute preference afforded by Massachusetts to veterans has a *devastating impact* upon the employment opportunities of women") (emphasis added).

[8] At the extremes, a court can presume discriminatory intent where facially neutral criteria apply to "such an irrational object of

(Footnote cont'd on next page)

City of Mobile, Ala. v. Bolden, 446 U.S. 55, 71 (1980) (abrogated by statute on other grounds, as stated in *Chisom v. Roemer,* 501 U.S. 380, 393 (1991)).

With no reason even to suppose that MHSAA or its members would respond differently upon adding a new boys' sport, CFE's disparate-impact claim cannot rise to a constitutional violation. For example, although Michigan girls now play field hockey in the fall, there is no reason to assume that MHSAA or schools would place boys' field hockey in the advantageous fall and move the girls' season to a less advantageous season. In other words, the first-come, first-served allocation rule is gender neutral. Consequently, that allocation rule does not violate equal protection. *Feeney,* 442 U.S. at 279.

Assuming *arguendo* that the allocation rule warrants further judicial scrutiny, with no gender-based motivation, it nonetheless does not constitute "such an irrational" mode of scheduling a new sport as to qualify for strict or intermediate scrutiny. *See Bray,* 506 U.S. at 270. Instead, under the rational-basis test, *McRae,* 448 U.S. at 297, the first-come,

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(Footnote cont'd from previous page.)

disfavor" in which a particular class engages exclusively or predominantly. *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 270 (1993). Thus, for example, "[a] tax on wearing yarmulkes is a tax on Jews." *Id.* Given the number of sports played by both genders in which boys' opportunities lag behind those for girls (*e.g.,* field hockey, volleyball, water polo, equestrian, gymnastics), *National Federation Survey,* at 10, 12, 13, 17, first-in-time status does not rise to the level of an *irrational* method of *predominantly* disfavoring girls.

first-served rule avoids disrupting existing coaching and other contracts as well as other ties between schools, teams, leagues, venues, and other entities.

Significantly, whatever MHSAA's individual *school members* do on their own campuses, nothing *at the MHSAA level* precludes CFE from playing sports in its preferred seasons: MHSAA allows female athletes to compete on boys' teams. *See* MHSAA Reg. II, §15, Interp. 213 (prohibiting boys from playing on girls' teams, but not prohibiting girls from playing on boys' teams) (C.A.J.A. at 2004). With no MHSAA barrier to CFE's equal *opportunity* to compete,[9] MHSAA cannot inflict a *constitutional* or *statutory* equal-protection injury on CFE. *See Gratz v. Bollinger,* 539 U.S. 244, 262 (2003) ("injury... is the denial of equal treatment [from] imposition of the barrier, not the ultimate inability to obtain the benefit"); *Feeney,* 442 U.S. at 273 ("settled rule that the Fourteenth Amendment guarantees equal laws, not equal results"). Because CFE can compete on an equal footing with boys, MHSAA has not violated CFE's equal-protection rights.

That Title IX and the Constitution *allow* gender-separate teams does not mean that they *require* them. *Coalition for Economic Equity v. Wilson,* 122 F.3d 692, 709 (9th Cir. 1997) ("The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely

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[9] EIA recognizes that MHSAA's brief interprets the MHSAA rules to allow girls to participate on boys' teams only in the absence of a reciprocal girls' team. Pet. at 2 & n.1. On their face, the MHSAA rules include no such exception.

permits"). Instead, it is the *Title IX regulations* that, in some circumstances, require recipients of federal education funding to sponsor gender-separate teams. The Sixth Circuit's *Horner* litigation recognized as much: namely, that the Equal Protection Clause protects against only actions taken because of gender, *Horner v. Kentucky High School Athletic Association,* 43 F.3d 265, 276 (6th Cir. 1995), whereas the Title IX regulations overlay an affirmative "equal opportunity mandate," *Horner v. Kentucky High School Athletic Association,* 206 F.3d 685, 694 (6th Cir. 2000). This distinction between the constitutional (and statutory) protection from intentional discrimination and the regulatory, groupwide equal-opportunity mandate is critical to understanding why CFE lacks a federal claim.

Assuming *arguendo* that its scheduling violates the intentional-discrimination standard, MHSAA nonetheless *lawfully* could collapse all gender-separate teams into combined-gender teams, thereby curing the violation but precluding most if not all CFE's members from participating. Although doing so may violate the Title IX regulations, *Williams v. School Dist. of Bethlehem,* 998 F.2d 168, 175 (3rd Cir. 1993) (under Title IX regulations, "'Athletic opportunities' means real opportunities, not illusory ones"), CFE would have no *private* right to enforce the extra-statutory, groupwide mandates that the regulations impose *on recipients* of federal funding. *Alexander v. Sandoval,* 532 U.S. 275, 285-90 (2001) (regulatory requirements on federal recipients do not and cannot constitute the rights-creating language necessary to support an implied private right of action); *accord Gonzaga University v. Doe,* 536 U.S. 273, 286 (2002) (applying *Sandoval* rationale to §1983 actions); *Blessing v. Freestone,* 520 U.S. 337, 340 (1997) ("In order to seek redress through §1983,... a plaintiff must assert the

violation of a federal *right,* not merely a violation of federal *law*") (emphasis in original).

Simply put, CFE has no federal right to have its sports in the seasons it wants. While no-one advocates the elimination of gender-separate teams, the *lawfulness* of that course highlights that CFE's only remedies for its perceived disparate-impact injuries lie in administrative proceedings before the U.S. Department of Education and (possibly) in state-law proceedings in an appropriate state forum.

CONCLUSION

Nothing in Title IX or any other provision of law prevents this Court from reaching the merits under the Fourteenth Amendment. Because neither MHSAA nor its member schools discriminated against CFE *because of* gender by adding new girls' sports around existing boys' and girls' sports, moreover, CFE cannot establish intentional discrimination under either Title IX or the Fourteenth Amendment. To resolve the important issues inherent in each question presented, this Court should grant the writ of *certiorari.*

February 28, 2007

Respectfully submitted,

LAWRENCE J. JOSEPH
2121 K Street, NW, Suite 800
Washington, DC 20037
Tel: 202-669-5135

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In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Petitioner,

v.

COMMUNITIES FOR EQUITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF MICHIGAN ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF PETITIONER

BRAD A. BANASIK
Counsel of Record
MICHIGAN ASSOCIATION OF SCHOOL BOARDS
1001 CENTENNIAL WAY, SUITE 400
LANSING, MI 48917
(517) 327-5900

Attorney for Amicus Curiae Michigan Association of School Boards

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF AMICUS CURIAE

The Michigan Association of School Boards ("MASB") respectfully submits this brief *amicus curiae* pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States.[1] Founded in 1949, the MASB is a voluntary, nonprofit association of local and intermediate boards of education throughout the State of Michigan, whose membership consists of the boards of education of over 600 local school boards and intermediate school boards in this state. The activities of the MASB include training programs and workshops for school leaders, informational support through publications and person-to-person contact, management consulting, policy analysis, legal services, and labor relations representation. The mission of the MASB is to provide quality educational leadership services for all Michigan boards of education, and to advocate for student achievement and public education.

The MASB Delegate Assembly is responsible for adopting resolutions that are the driving force behind the positions taken by the MASB on issues important to public education and Michigan schools. The Delegate Assembly has adopted the following resolution on student participation in extra curricular activities:

> The Michigan Association of School Boards urges every board of education to encourage student

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[1] *Amicus* files this brief with the consent of all parties. Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, MASB states that no counsel for any party authored this brief in whole or in part, and no person or entity other than MASB and its counsel made any monetary contribution to the preparation or submission of this brief.

participation in co-curricular activities. There are many valuable programs, both athletic and non-athletic, that schools offer to their students, and any additional involvement beyond academic classes can add to a student's total educational experience.

Thus, the MASB is concerned with the effect that the Court of Appeals' decision will have on the ability of local school boards to maximize participation in high school athletics. The authority of school districts to schedule sports in the seasons they choose in order to maximize participation and the quality of those opportunities for girls and boys needs to be preserved. For this reason, MASB submits that the petition for a writ of certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

STATEMENT OF THE CASE

We adopt the Statement of the Case as presented by Petitioner.

QUESTIONS PRESENTED FOR REVIEW

We adopt the Questions Presented as presented by the Petitioner.

SUMMARY OF THE ARGUMENT

Her Life Depends On It: Sport, Physical Activity and the Health and Well-Being of American Girls, is a 2004 report published by the Women's Sport Foundation[2] that discusses

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[2] Founded in 1974 by Billie Jean King, the Women's Sport Foundation is a national charitable educational organization seeking

the impact of physical activity on the physical, psychological and cultural health of girls. While the report includes a compendium of research that points to physical activity and sport as fundamental solutions for many of the serious health and social problems faced by American girls, its primary message emphasizes the importance of providing access and participation opportunities in athletics for females:

> A tidal shift is occurring in discussions of Title IX....The issue is no longer whether girls are assured the same access to facilities, scholarships and social support as boys. Rather, there is rising concern that girls, their families and communities do not have full access to the educational, social and health benefits that sports and physical activity can provide. Increasingly the debate is not so much about equal gym time as it is about a healthy lifetime. Sport is about a great deal more than fun and games.

Don Sabo, et al., *Her Life Depends On It: Sport, Physical Activity and the Health Well-Being of American Girls* (Women's Sports Foundation, May 2004) at 6.[3]

Likewise, Michigan school boards are aware of the intrinsic benefits of participating in interscholastic athletics, and particularly the benefits received by female athletes. Thus, the members of *Amicus* have strived to remove barriers and restrictions that may limit participation opportunities for interscholastic female athletes. And, presently, Michigan

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to advance the well-being and leadership skills of girls and women through sports and physical activity.

[3] Available at http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/body/article.html?record=990

school boards are utilizing limited resources to maximize athletic participation opportunities.

Regrettably, the decision of the Court of Appeals strips school boards of the capacity to take full advantage of existing capital and human resources to provide extracurricular athletic opportunities. At a time when the number of female interscholastic athletes reached an all-time high in Michigan, school boards will be faced with the reality of eliminating athletic teams to accommodate the demands on facilities, coaches, and game officials as a result of combining girls' and boys' athletic seasons as directed by the Court of Appeals.

The decision also undermines the local control of school boards at an unprecedented level by overruling over 30 years educational decision-making that determined what interscholastic sports will be conducted, how those sports will be conducted and when those sports will be conducted. Courts have traditionally been reluctant to supplant educational judgment when doing so would interfere with a school board's good faith performance of its core academic functions.

Lastly, the Court of Appeals' application of the Equal Protection Clause invites constitutional claims over every detail of how single-gender educational programs are administered. The Court's misclassification of any difference between male and female programs as a presumptively unconstitutional facial gender classification opens the door for school districts to be besieged with claims of discriminatory treatment relating to even the smallest differences between separate programs.

ARGUMENT

I. The Decision Of The Court Of Appeals Will Hinder The Ability Of Michigan School Boards To Maximize Athletic Participation Opportunities For Students.

According to a survey conducted by the National Federation of State High School Associations ("NFHS"),[4] Michigan school districts set all-time highs for participation in high school athletics during the 2005-06 school year.[5] While Michigan ranks eighth nationally in high school age population,[6] it has the fifth highest participation number of 321,250 student-athletes. Furthermore, the number of female interscholastic athletes in Michigan increased to 135,377, which is the fourth highest participation number in the country for female athletics, trailing only the largest populated states of California, Texas and New York and remaining ahead of the more densely populated states of Illinois, Ohio, Pennsylvania and New Jersey.

While the results of the survey clearly indicate that male and female students in Michigan make athletics a top priority, board of education members might view the results from a different perspective. The board member who is focused on the educational mission of the school district will look beyond the wins and losses and individual achievements that most

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[4] Founded in 1920, the NFHS provides leadership for the 50 state high school athletic/activity associations in the administration of education-based interscholastic activities, which support academic achievement, good citizenship and equitable opportunities.

[5] http://www.nfhs.org/core/contentmanager/uploads/2005_06NFHSparticipationsurvey.pdf

[6] According to 2005 U.S. Census Bureau figures.

community members associate with interscholastic athletics. Such board members see high school sports not just as an extracurricular activity, but as an extension of a good educational program that supports the academic mission of the school district. For example, sports programs are capable of promoting responsible social behaviors and greater academic success, confidence in one's physical abilities, an appreciation of personal health and fitness, and strong social bonds with teammates. Research has found that students who spend no time in extracurricular activities are 57 percent more likely to have dropped out of school by the time they would have been seniors; 49 percent more likely to have used drugs; 37 percent more likely to have become teen parents; 35 percent more likely to have smoked cigarettes; and 27 percent more likely to have been arrested than those who spend one to four hours per week in extracurricular activities. *Adolescent Time Use, Risky Behavior, and Outcomes: An Analysis of National Data*, Department of Health and Human Services, September 1995.

Understandably, *Amicus* celebrated the results of the recent NFHS athletics participation survey. The survey proves that Michigan students are currently able to take full advantage of the extra educational opportunities that boards of education are offering to them. The results also justify the decisions by boards of education to offer a full-range of athletic opportunities during difficult economic times for Michigan school districts. In many cash-strapped school districts, athletic programs are usually spared while budget cuts lead to the elimination of pupil transportation and pink-slipped teachers. Although, under such circumstances, the athletic teams are usually subsidized by participation/activity

fees paid by students, which makes Michigan's interscholastic athletic participation ranking even more impressive.[7]

The ability of boards of education to maximize athletic opportunities for students is facilitated by the current athletic scheduling system. Specifically, the decision to schedule girls' basketball in the fall and girls' volleyball in the winter maximizes participation in these sports with expanded opportunities to play on junior varsity and freshman teams. Because of demands on facilities, coaches and officials, if girls' basketball is moved to the winter to align with boys' basketball, as directed by the District Court and Court of Appeals, school districts would be faced with the reality of eliminating junior varsity and freshman teams. A school district with one high school gymnasium would experience a scheduling nightmare trying to accommodate practices and games for six different basketball teams. Further, finding six different qualified coaches to lead the teams would also be problematic. Over three hundred Michigan basketball coaches presently coach both boys' and girls' teams. Thus, aligning the girls' and boys' basketball seasons could immediately result in three hundred coaching vacancies if junior varsity and freshman teams were not eliminated. The workload of registered basketball officials would also be doubled under a scheduling system that included simultaneous seasons. Currently, basketball officials are able to spread their workload by finding assignments for two or three games per week over a period of six months. Moving to simultaneous seasons would require officials to compress their schedules and work the same amount games in a three-month

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[7] According to the MHSAA's 2005 Participation Fee Survey, 159 schools assessed a student-athlete participation fee in 2004. The survey is available at http://www.mhsaa.com/resources/06feesurvey.pdf.

period. It is unlikely that the current number of registered officials would be able or willing to carry out the demands of such a schedule.

Based on the foregoing circumstances, it is not a mystery as to why Michigan ranks third and fourth nationally in boys' and girls' high school basketball participation. Logically, other states that have girls and boys contested in the same season may have been forced to eliminate either freshman or junior varsity squads to accommodate the demands on facilities, coaches and officials, resulting in lower participation rates in high school basketball, which is illustrated by the recent NFHS high school athletics participation survey. According to the survey, Michigan currently averages twenty-nine girls' basketball players per school, far more than in other states.[8] For example, Iowa, Kentucky, Missouri, and Ohio average twenty-three players, Florida averages nineteen players, Tennessee averages eighteen players, and Oklahoma averages sixteen players per school.

However, what is most alarming to school boards in Michigan are the decreased participation numbers of states that have switched girls' volleyball and basketball seasons in recent years as indicated by previous NFHS surveys. In North Dakota, in the year of the change, there was a 10.67 percent drop in girls' basketball participation, 7.0 percent drop in girls' volleyball participation, and a 2.5 percent drop in boys' basketball participation. In South Dakota, within two years of the change, the number of participants in girls' and boys' basketball dropped 13.1 percent and 9.5 percent respectively. In Montana, within two years of the change, the number of participants in girls' basketball and girls' volleyball

[8] Michigan averages thirty boys' basketball players per school.

dropped 10.9 percent and 6.1 percent respectively. In West Virginia, since the change was made in 1995-96, the number of girls' and boys' playing high school basketball has dropped 19.4 percent and 27.4 percent respectively.

All the data relating to the participation rates should discount any claim that Michigan's current scheduling system discriminates against females. In fact, the current athletic seasons approved by Michigan school boards arguably provide *greater* athletic and learning opportunities than the other states that offer a "traditional" schedule. Rather than being scrutinized, Michigan school districts should be applauded for resisting to "follow the crowd" by blindly falling in line with other states and switching to the "traditional" athletic seasons schedule. Admirably, Michigan school boards have remained independent when determining sports seasons, focusing on the needs and interests of all student-athletes, not just the small percentage of those who may receive an additional benefit from participating during "traditional" seasons.

II. The Decision Of The Court Of Appeals Undermines The Local Control Of Michigan School Boards.

Judicial deference to academic judgment in a range of areas is consistent with the principle of academic independence that the Court of Appeals' decision disregards. Courts have been chary to supplant educational judgment when doing so would interfere with a school board's good faith performance of its core functions.

In particular, this Court has repeatedly recognized that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools." *Milliken v. Bradley*, 418 U.S. 717, 741 (1974); *see e.g.*,

Dayton v. Brinkman, 433 U.S. 406, 410 (1977) ("[O]ur cases have...firmly recognized that local autonomy of school districts is a vital national tradition."). This Court has always been "reluctan[t] to trench on the prerogatives of state and local educational institutions." *Regents of the University of Michigan v. Ewing,* 474 U.S. 214, 226 (1985). That reluctance is grounded both in federalism concerns and in a healthy awareness of limited judicial competence in educational administration. *See San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 42-43 (1973) (courts lack "specialized knowledge and expertise" in educational policy). Because federal courts are not "suited to evaluate the substance of the multitude of academic decisions" made by public educational institutions, those institutions are granted "the widest range of discretion" in carrying out their educational missions. *Ewing*, 474 U.S. at 226 n. 11 (internal quotation omitted).

On a number of occasions, this Court has affirmatively passed at opportunities to second-guess the educational decisions of school officials. In *Wood* v *Strickland*, 420 U.S. 308 (1975), for example, this Court opined that

> [i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion....This system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members.

Wood, supra at 326.

And more recently, this Court was asked to interpret the Family Educational Rights and Privacy Act ("FERPA"), 20

U.S.C. § 1232g, to determine if the federal law prohibits students from grading one another's papers. This Court used the opportunity to again acknowledge that it will hesitate before interpreting a federal statute to effect a substantial change in the balance of federalism, unless that is the manifest purpose of the legislation. In emphasizing this point, this Court stated:

> We doubt Congress meant to intervene in this drastic fashion with traditional state functions. Under the Court of Appeals' interpretation of FERPA, the federal power would exercise minute control over specific teaching methods and instructional dynamics in classrooms throughout the country. The Congress is not likely to have mandated this result, and we do not interpret the statute to require it.

Owasso Indep. Sch. Dist. v *Falvo*, 543 U.S. 426 (2002).

Likewise, under Title IX of the Education Amendments of 1972, 20 U.S.C § 1681, *et seq.* ("Title IX"), it is unlikely that Congress would mandate uniformity of athletic seasons for all of the States' schools, in terms of combining boys' and girls' seasons in the same sport and following "traditional" seasons set by a majority of states. If there is no indication of discriminatory intent in developing and maintaining separate and "non-traditional" seasons, the manifest purpose of Title IX does not necessitate the courts to interfere with the scheduling of such seasons.

If this Court grants the petition for a writ of certiorari and reverses the decision of the Sixth Circuit, the scheduling of interscholastic sports in Michigan will once again be left up to local school districts. School boards will make a local policy decision based on the best interests of the school

district, the student body and the community. Accordingly, the MHSAA will periodically survey and then accommodate school districts by scheduling its post-season tournaments at the time of year when schools are conducting their seasons.

The most recent survey conducted by the MHSAA in 2002 indicates how strongly local school districts feel about realigning athletic seasons. The survey was returned by 86 percent of the schools that belong to the MHSAA. Of the schools that responded, a resounding 75.8 percent declared that basketball is the sport that they would least want combined in the same season for boys and girls. Further, 78.4 percent of the schools stated that basketball is the girls' sport that they would least want moved to a different season.

The results of the survey clearly indicate that Michigan school districts wish to continue the status quo in regards to scheduling athletic seasons. Granted, the status quo is overwhelmingly in the minority when compared to the athletic seasons of other states. However, data suggests that it currently produces greater participation opportunities for both female and male student athletes. Eventually, Michigan school districts may decide to switch to "conventional" or "traditional" athletic seasons, but that decision should be based on the best interests of the local school district and not forced due to non-conforming with the athletic seasons schedules of other states.

The decision of the Court of Appeals necessitates this Court to reaffirm the educational discretion properly vested in state and local education officials to practice their core educational mission, which, in this case, involves providing a unique and effective athletic scheduling option that maximizes the amount of athletic opportunities for all students.

III. The Decision Of The Court Of Appeals Will Cause Irreparable Harm To Single-Gender Athletic Teams and Educational Programs.

It is safe to say that almost all interscholastic athletic programs operate with separate-sex athletic teams. The reasons for single-gender teams vary from citing the physical and psychological differences between males and females to concerns that there would be a substantial risk that males would dominate the female programs and deny females an equal opportunity to compete in interscholastic events without a gender-based classification. *See O'Conner v. Board of Education of School District 23,* 449 U.S. 1301 (1980). In any event, there is clearly a need for separate-sex athletic teams in public schools.

However, the decision of the Court of Appeals to classify any difference between single-gender teams as a facial gender classification serves to possibly threaten the existence of having separate high school sports teams for males and females. Because every decision that results in even the smallest difference between single-gender teams has now the potential of turning into a constitutional battle in court, schools may rethink whether offering separate teams is actually worth the risk of violating the Equal Protection Clause.

The operation of just two single-gender athletic teams has the potential of creating a multitude of differences between the two teams, each carrying the threat of an Equal Protection claim that compels the school district to now provide an exceedingly persuasive justification for the distinction. For example, a school district can easily establish substantially equal boys' and girls' basketball teams, but the administration

of the two teams could lead to several other minor differences in addition to playing in different seasons, such as:

- If the two teams play during the same season, the teams will have a different coach.
- The teams will have different practice schedules if a gymnasium must be shared.
- The teams will likely have their games officiated by different referees.[9]
- The teams will have different locker rooms.
- The teams will have different uniforms.
- The length of practices may vary between the two teams.
- The teams may play on different days of the week.
- Cheerleaders may perform at games for one team, but not the other.
- The pep band may play at games for one team, but not the other.
- The athletic boosters may operate a concession stand at games for only one team.

Thus, the differences that result from administering two separate single-gender teams are limitless. Like the scheduling of the teams' seasons, the differences relate to the operation of the two teams from a gender-neutral perspective. In other words, the teams have different uniforms because they are different teams, not because one team is made up of boys and the other consists of girls. Likewise, cheerleaders

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[9] Ironically, the first three differences that are noted are exacerbated by the change of seasons that the lower courts have mandated. Thus, the Court of Appeals' decision not only provides a greater opportunity for challenging single-gender athletic programs, it also serves to create additional circumstances that will be ripe for Equal Protection claims.

may perform only at boys' basketball games because those games traditionally draw larger crowds; the gender of the team is, once again, not a factor in making a determination that results in a disparity between the boys' and girls' teams. And, when such a difference is treated as a facial gender classification, it is unlikely that the school district's justification for the different treatment – that the cheerleaders simply like performing before larger crowds – would achieve the "exceedingly persuasive" standard. Further, it would be an administrative nightmare for a school district to even attempt to operate boys' and girls' teams without creating even the slightest difference. Sadly, as a result of the Court of Appeals' decision, the only infallible approach for school districts that wish to avoid future facial gender discrimination claims is to eliminate separate-gender athletic teams entirely.

In the past, colleges and universities were placed in the unenviable position of eliminating athletic teams in order to comply with the equality requirements of Title IX. The discourse that this practice created eventually led to a new interpretation of complying with Tile IX by the Department of Education, Office of Civil Rights.[10] Now, high schools may have to consider the same difficult decisions in order to comply with the Equal Protection Clause, as interpreted by the Court of Appeals.

Ironically, the decision of the Court of Appeals comes at a time when schools are being encouraged to consider establishing single-gender educational programs. Recently,

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[10] United States Department of Education, Office of Civil Rights, July 11, 2003, *Dear Colleague Letter* ("OCR hereby clarifies that nothing in Title IX requires the cutting or reduction in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice.").

the U.S. Department of Education issued regulations implementing Title IX that give educators more flexibility to offer single-gender classes, extracurricular activities and schools at the elementary and secondary education levels.[11] Additionally, the Michigan Legislature recently passed two bills that removed state restrictions that hindered the establishment of K-12 single-gender educational programs.[12] These changes were prompted by a provision in the No Child Left Behind Act of 2001, 20 U.S.C. 7215(a)(23) (Supp. I 2003), which provides for the allocation of federal funds to local educational agencies for "innovative assistance programs," including "[p]rograms to provide same-gender schools and classrooms."

For most school districts, however, the risk of costly litigation relating to minor differences between all-boys and all-girls schools or classrooms will likely outweigh the prospect of receiving whatever additional funding the federal government can provide. It is difficult to see how a school could prove an exceedingly persuasive justification for different lunch menus, for example, between two single-gender schools. Much like scheduling seasons for single-gender athletic teams, establishing lunch menus for a school

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[11] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Final Rule, 71 Fed. Reg. 62,530 (Oct. 25, 2006) (codified at 34 C.F.R. pt. 106).

[12] *See* Mich. Comp. Laws § 380.1146, *amended by* Public Act 303 of 2006 (permits establishing a school, class, or program within a school in which enrollment is limited to pupils of a single gender); Mich. Comp. Laws § 37.2404a, *added by* Public Act 348 of 2006 (provides that Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101, does not prohibit the board of a school district from establishing a single-gender school, class, or program within a school).

is one of many administrative decisions that must be made in managing the school. Such decisions will inevitably create minor differences between two programs or schools, while overall, they remain substantially equal.

This Court has advised lower courts "to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." *San Antonio Independent School District,* 411 at 42-43. The Court of Appeals, however, has ignored this guidance by not requiring proof of intentional discrimination in accepting the plaintiffs' Equal Protection and Title IX claims. Because Michigan's interscholastic athletic seasons are "non-traditional" or "non-conforming" compared to other states, the Sixth Circuit presumed intentional discrimination and therefore found Establishment Clause and Title IX violations. However, this presumption creates an "inflexible restraint" that will abolish a unique and innovative scheduling system that is embraced by Michigan school districts and maximizes athletic participation opportunities. Because being different should not automatically amount to being discriminatory, the judgment of the Court of Appeals must be reversed.

CONCLUSION

For the reasons set forth above, MASB submits that the petition for a writ of certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

Brad A. Banasik
Counsel of Record
MICHIGAN ASSOCIATION OF
SCHOOL BOARDS
1001 CENTENNIAL WAY, # 400
LANSING, MICHIGAN 48917

Counsel for Amicus Curiae Michigan Association of School Boards

(4)

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In The

Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

Petitioner,

v.

COMMUNITIES FOR EQUITY, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE MICHIGAN HIGH SCHOOL TENNIS COACHES' ASSOCIATION AND OF RICHARD D. FRIEDMAN, AS NEXT FRIEND TO REBECCA A. FRIEDMAN, RAFAT RIZK, AS NEXT FRIEND TO MONIKA RIZK, AND AMY CHRISTMAN, AS NEXT FRIEND TO LANDRIA CHRISTMAN, AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

RICHARD D. FRIEDMAN
Counsel of Record
625 South State Street
Ann Arbor, Michigan 48109
Telephone: (734) 647-1078
Facsimile: (734) 647-4188
E-mail: rdfrdman@umich.edu

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INTEREST OF *AMICI CURIAE*[1]

The Michigan High School Tennis Coaches' Association (MHSTeCA) is an organization of 398 high school tennis coaches throughout Michigan, dedicated to the advancement of the sport in the state. Many of its members have been active in Michigan high school tennis for several decades. The membership of MHSTeCA has a deeper knowledge of Michigan high school tennis than any other person or group of people; more than any other group, it reflects an embodiment of the Michigan high school tennis community. MHSTeCA's Board of Directors, which has 58 members distributed among the eight districts of the state, having previously voted unanimously in favor of keeping girls' tennis in the fall, has reviewed most of the contents of this brief and approved its contents and submission emphatically and without dissent. MHSTeCA believes the views stated here – showing why fall is a far better season than spring for high school tennis in Michigan – are shared nearly unanimously by Michigan high school tennis coaches. Accordingly, the order of the District Court, which would require a shift of girls' tennis in the Lower Peninsula of Michigan from the fall to the spring, would clearly be detrimental to the interests of girls who play high school tennis in the Lower Peninsula, which accounts for about 97% of the state's population.

Richard D. Friedman is the father and next friend to Rebecca A. Friedman, Rafat Rizk is the father and next friend to Monika Rizk, and Amy Christman is the mother and next friend to Landria Christman. All three girls are high school

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[1] The parties have consented to the filing of this brief. A blanket consent to *amicus* briefs has been filed with the Clerk of the Court by by Petitioner and is noted in the Court's docket. A copy of the written consent of Respondents has also been filed with the Clerk. This brief was not authored in any part by counsel for either party, and no person or entity other than *amici curiae*, members, and counsel made a monetary contribution toward the preparation or submission of this brief.

freshmen. Rebecca and Monika, both 14, attend Ann Arbor Huron High School (the Rizk family having moved to Michigan only in the summer of 2006), and Landria, 15, attends Allegan High School. Each of them tried out for her school's varsity tennis team beginning August 14, 2006, and made the team a few days later (in the same month as the decision of the panel of the Court of Appeals for the Sixth Circuit on remand from this Court). Switching girls' tennis from the fall to the spring would hurt both girls because, for the reasons explained in this brief, the fall is the far superior season for girls' high school tennis in Michigan. Moreover, in each case another factor – in addition to those generally applicable to girls playing in tennis in Michigan – would make a switch of seasons particularly harmful.

The switch would be particularly detrimental to the interests of Rebecca and Landria because it would force them to choose between their two favorite sports. Rebecca's two favorite sports, and the two sports in which she is most proficient, are tennis and softball. The softball coach at her school, who has seen her play in pre-season workouts, is confident that she will make the varsity this year. Similarly, Landria's two favorite sports, and the two sports in which she is most proficient, are tennis and soccer. Landria and her family believe that she has an excellent chance of making the varsity soccer team this season, and in any event that she is virtually certain to do so by next season. As the seasons now stand, each girl is able to play both her favorite sports. If the tennis season switches to spring, each will have to give up one sport or the other. Each would have, at best, a much reduced prospect of being able to play another varsity sport in the fall – and even if she were able to, it would not be a sport that she enjoys as much, or one in which she is as good or as experienced as in her two favorites. As further described below, the situation of Rebecca and Landria is representative of that which will face many girl tennis players in Michigan if the seasons switch; the switch would cause far more conflicts between favored sports for girls than

it would relieve.

The switch would be particularly detrimental to Monika's interests because she suffers from Raynaud's Disease, a disorder that mostly affects young females and that makes some parts of the body feel numb and abnormally cool in response to cold temperatures, resulting in pain, swelling, numbness, tingling, and throbbing of the fingers and toes. Because, as further described below, the spring is a much colder season than the fall in Michigan, the switch of seasons would severely impair Monika's ability to play high school tennis.

SUMMARY OF ARGUMENT

In an extremely cursory discussion, 178 F.Supp.2d at 836, the District Court determined – on very little evidence and without reference to considerations that guided its decision as to other sports -- that the fall is less advantageous than the spring for tennis. This was clear error: Fall is the preferable season for high school tennis in Michigan. A switch of seasons would *hurt* the interests of girls who play high school tennis. Fall is the season in which most high school girls in the nation play tennis. The weather in Michigan is far better in the fall than in the spring, and that is especially important for girls' tennis. The fall is better placed in relation to the school calendar, and opportunities to prepare are far superior for the fall season. Switching tennis to the spring would deprive Michigan girls of some excellent opportunities for interstate competition that they now have, and it would force many girls to choose between their two favorite sports.

The fact that MHSAA assigns girls' tennis to the fall and boys' tennis to the spring weighs *against*, rather than supports, the District Court's finding that the overall allocation of Michigan high school athletic seasons discriminates against girls. Moreover, even assuming that there has been such discrimination and that a reallocation of seasons is part of an

appropriate remedy, the remedy should not include a switch of girls' tennis to the spring, which would aggravate rather than mitigate the situation.

The fact that the fall is so clearly the better season for girls' tennis in Michigan – indeed, *amici* do not believe that on careful inspection this proposition is open to serious doubt – also has a broader significance for this case. The District Court fell into error with respect to girls' tennis because of a structural problem in this litigation. The interest of the respondents was to show discrimination wherever it could. Petitioner MHSAA, in responding to the litigation as in developing the schedule of seasons that became the principal subject of this litigation, had to reconcile a wide variety of interests – involving many sports and the interests of both boys and girls. *Amici* mean no criticism of either the respondents or of MHSAA in pointing this out; on the contrary, the problem is that each party served its interests as it thought best, those interests did not align with those of girls' tennis, and as a result, when this matter was tried in 2001, no one presented to the District Court the case demonstrating that the fall is clearly the better season for girls' tennis. In considering the pending Petition, the Court should recognize the variety of factors MHSAA must attempt to reconcile. Such recognition should inform the Court's assessment not only of the procedural problem in this case but also of the substantive standard of conduct governing state athletic administrative authorities like MHSAA.

ARGUMENT

I. THE FALL IS THE BETTER SEASON FOR GIRLS' HIGH SCHOOL TENNIS IN MICHIGAN.

A. The Large Majority of Girls' High School Tennis Throughout the Nation Is Played in the Fall Season, and Participation Rates Are Higher Where Tennis Is Played in the Fall than Where it Is Played in the Spring.

In justifying its decision that Michigan's choices of seasons for girls' volleyball and basketball is disadvantegous to girls, the District Court pointed to the fact that those choices are highly idiosyncratic, contrary to the format in 48 states. *See* 178 F. Supp.2d at 818 & n.6. By contrast, the District Court did not consider at all in which season most girls throughout the nation play tennis. In fact, high school girls in Michigan play tennis in the same season as most of their peers throughout the nation. Among the states in which girls' high school tennis is played in the fall are seven of the nation's eight largest by population (excluding only Florida).[2] Except for Indiana, all of the states touching the Great Lakes and all of the states bordering Michigan, or within 200 miles of Michigan, play girls' high school tennis in the fall.

In about 60% of the nation, as measured by population, girls play high school tennis in the fall. Furthermore, in fall states, though they are weighted towards the colder parts of the country, 611 girls per million total population play high school tennis, while in spring states 580 girls per million total population play. Where boys play tennis in the fall, the participation rate is 629 per million, and where they play in the spring the rate is only 520 per million.[3] Thus, *boys, like girls,*

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[2] A listing, *High School Tennis Seasons, State by State* is posted on MHSTeCA's website, www.mhsteca.org.

[3] Population data are available from United States Census Bureau, *Annual Estimates of the Population for the United States, Regions*

participate more in high school tennis when it is played in the fall than when it is played in the spring.

B. The Weather for Playing Tennis in Michigan Is Far Better in the Fall Season than in the Spring Season.

The most obvious reason why the fall is superior for tennis in Michigan is one that the District Court utterly disregarded in the present context: ***The weather is far better in the fall season than in the spring season.***

The District Court recognized that weather is critical in determining the optimal season for a given sport. 178 F. Supp.2d at 808 (citing "Michigan weather" as an "obvious" factor even to "the casual observer," and tennis as one of the sports not played outside in Michigan in the winter for this reason). And in concluding that fall is better than spring for golf, the court relied heavily on the superiority of fall weather. *Id.* at 832 (noting that "[g]irls are more likely to face cold, icy weather" in the spring than in the fall). In discussing its finding that the spring is the better season for tennis, however, the District Court ***did not mention weather at all.*** But it is clear beyond genuine dispute that (1) weather is a particularly important factor in the context of high school tennis, (2) in the case of tennis as in golf, the weather in Michigan is far better for tennis during the fall than during the spring, and (3) the differential in weather is more significant for girls than for

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and States, and for Puerto Rico: April 1, 2000 to July 1, 2006 (NST-EST2006-01), <http://www.census.gov/popest/states/NST-ann-est.html>. Participation data are available at National Federation of State High School Associations, *2005-06 High School Athletics Participation Survey*, <http://www.nfhs.org/core/contentmanager/uploads/2005_06NFHSparticipationsurvey.pdf> (hereinafter NFSHA Athletics Participation Survey). The Survey does not give participation data for tennis in Georgia; accordingly, the per capita participation numbers presented here have been calculated without reference to that state.

boys.

Tennis is highly vulnerable to bad weather – indeed, probably more than any other sport in which Michigan high school students compete. Precipitation, wind, and cold all have severely adverse impacts on the sport. With respect to each of these three factors, the fall season is clearly superior to the spring season. And, though indoor courts present a feasible alternative during the summer, they do not – except with respect to end-of-season tournaments – for most practices and competitions between September and May.

Precipitation – Tennis courts become dangerously slippery when wet. Therefore, even a light drizzle will cause at least suspension of a match. Even if the precipitation ends quickly, that does not mean the match can continue; the courts must first dry, and especially in cool weather this can take hours.

Precipitation is a significantly greater problem in the spring season than in the fall season in Michigan's populous areas. For example, in Detroit, the state's largest city, the average number of days per month with at least .01" precipitation is 12.7, 12.5, and 11.6 for March, April, and May, respectively, but only 9.5, 9.9, and 9.8 for August, September, and October, respectively.[4]

Cold – Cold weather makes for particularly miserable playing conditions for tennis, because it requires great manual dexterity on the part of all players, it is played nearly continuously, with only short breaks, *and* using gloves handicaps a player significantly. And there can be no doubt that in Michigan the spring is much colder than the fall.

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[4] The precipitation and temperature data presented here, and similar data for many other locations, are available from the *Climate of the Midwest* website of the Midwestern Regional Climate Center, <http://mcc.sws.uiuc.edu/climate_midwest/mwclimate_data_summaries.htm>. Detroit is used here for illus-trative purposes; the situation is materially similar throughout the Lower Peninsula of Michigan.

The fall season begins in summer warmth, with temperatures typically in the 80s in the Lower Peninsula.[5] More than a month – nearly half the season – passes before the weather cools to the very highest level that the spring season reaches *at its tail end.* Even at the end of the season in October, the weather is generally tolerably warm – and as discussed below, if the weather is poor then, when end-of-year tournaments are played, that is of secondary importance.

The spring season, by contrast, begins in March, in winter cold; March is a heavy-snow month. Even in early and mid-April, the temperature is generally cool, and frequently intolerably cold; snow remains a significant problem. For only 44 days of the nominal 83-day season is the average temperature (using Detroit figures) 60° or greater – as compared to 67 out of 69 days in the fall.

Cold temperatures pose significantly more of a problem for girls than for boys, because Raynaud's Disease overwhelmingly affects girls rather than boys. Girls with Raynaud's, like *amica* Monika Rizk, are especially susceptible to cold and numbness in various parts of their bodies – most significantly, with respect to tennis, in their fingers and toes – in response to cold temperatures. They suffer pain, numbness, swelling, tingling, and throbbing of the fingers and toes, and the symptoms are aggravated by stress.[6] Accordingly, their ability to play tennis is severely impaired by cold weather, and their well-being is impaired by playing tennis in the cold.

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[5] In 2006-07, the Lower Peninsula season dates are March 12 to June 2 for boys and August 14 to October 21 for girls.

[6] *See, e.g.*, National Institute of Arthritis and Musculoskeletal and Skin Diseases, *Questions and Answers About Raynaud's Phenomenon*, <http://www.niams.nih.gov/hi/topics/raynaud/ar125fs.htm>; MayoClinic.com, *Raynaud's disease*, <http://www.mayoclinic.com/health/raynauds-disease/DS00433>; K.M. Brown, et al., *The Effects of Stress, Anxiety, and Outdoor Temperature on the Frequency and Severity of Raynaud's Attacks: The Raynaud's Treatment Study*, 24 JOURNAL OF BEHAVIORAL MEDICINE 137 (2001).

Wind – Wind plays special havoc with tennis. A tennis ball, light and hollow, is hit in the air – not held or hit on the ground – throughout play. Wind can easily turn an ideal shot (one just touching a line) into a completely worthless one. Wind is an especially adverse factor for girls, because they tend to hit the ball higher and softer than boys.

The spring is much windier than the fall in Michigan. In Detroit, the average wind speeds for March, April, and May, respectively, are 12, 12 and 10 mph; for August, September, and October, respectively, they are 8, 9, and 10 mph.[7]

Indoor Courts. Over summer, when much of the fall season is played, demand for indoor tennis courts is usually very light. Thus, if the weather is bad, teams can often practice and compete indoors.

By contrast, between Labor Day and Memorial Day (a few days before the boys' state tournaments), virtually all high school tennis practices and competitions must be held outside, because almost all indoor courts are reserved on a regular basis for other uses. If practice courts are available, they are expensive, and unless practice is held at an extremely inconvenient time (such as 5 am) there are not enough courts to hold a full team practice. As for competitions, a given community virtually never has sufficient available indoor courts for a match or tournament to be held. The usual end result is simple: *If a match or tournament cannot be played outside, it cannot be played.*

The only significant exceptions are the end-of-season fall tournaments. Because of the importance and one-shot nature of these tournaments, available courts can be found. Indeed, these tournaments are played largely during the ordinary school day, increasing availability, and in cities with sufficient capacity to move inside if necessary. Moreover, after the

[7] U.S. Department of Commerce National Climatic Data Center, *Climatic Wind Data for the United States from 1930-1996, available at* http://www5.ncdc.noaa.gov/document library/pdf/wind1996.pdf.

regional tournament, which is usually completed on a Friday, the season has ended for most players, so the problem is mitigated. In short, even if the weather is bad at the very end of the fall season, the problem is not serious, because an adequate substitute is at hand.

C. The Fall Season Is Far Better Placed than the Spring Season in Relation to the School Calendar.

The fall tennis season begins approximately three weeks before school. Players can try out, practice, and compete with few other demands on their time. When the season ends in October, end-of-semester exams are still months away.

The spring season, by contrast, is played entirely during the school year. It reaches its climax near the end of the year, around the time of final exams. Indeed, the two weeks of Advance Placement exams occur in May, overlapping with regional tournaments. For seniors, the timing is particularly difficult. Their school year typically ends before Memorial Day. Thus, final exams are held during the tennis season. End-of-year school ceremonies and celebrations are often held during the season, and teams are frequently forced to choose between attending these significant culminating events and competing in the end-of-year tournaments. One would be hard pressed to select a season better designed to add stress to a teenager's life and conflict with high school's educational mission.

D. Opportunities to Prepare for the Fall Season Are Far Superior to Those for the Spring.

In justifying its conclusion that the fall is the better season for golf, the District Court relied heavily on the fact that the opportunities to prepare for the season are far better for the fall than for the spring. 178 F.Supp.2d at 832. Similar considerations apply with respect to tennis, but the District Court did not

mention them.

For nearly two months before the fall season begins, students are out of school on summer vacation. The weather is warm, they can play outside, courts are plentiful, and a wealth of instructional programs – camps and clinics – and of tournaments is available. It is relatively easy for a girl to begin the season well prepared.

The period before the spring season, like the season itself, occurs entirely during the school year, while students are occupied with their studies, and in dead of winter, precluding outside play. For many students, indoor play is prohibitively expensive. In any event, most students cannot feasibly play indoors for more than a small amount of time per week. Tournaments and instructional programs are considerably sparser than during the summer. Boys now are therefore far more likely than girls to come to tryouts poorly prepared.

E. Keeping Tennis in the Fall Season Creates Far Fewer Conflicts for Girls Wishing to Play Two Sports.

The spring is a more crowded season for girls' sports in Michigan than is the fall. Moving girls' tennis into the spring would aggravate the situation, preventing many girls from being able to play two sports.

Apart from tennis, the girls' sports now sanctioned by the MHSAA for the fall, the number of participants in each, and the total number of participants are as follows:[8]

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[8] Participation figures for these tables are taken from the NFSHA Athletics Participation Survey, *supra* note 3. The figures here are for the entire state, but the season allocations are those for the Lower Peninsula only. (The District Court's order would leave girls' tennis in the fall in the Upper Peninsula.) The difference is not material, because approximately 97% of the population of the state is in the Lower Peninsula. *See* State of Michigan, *Estimated Population of Michigan Regions and Statistical Areas: 2000-2004*,

Basketball	20,604
Cross-Country	6,976
Swimming	6,910
Total	34,490

The corresponding data for the spring season are as follows:

Golf	3,713
Lacrosse	1,515
Soccer	13,972
Softball	17,132
Track & Field	18,655
Total	54,987

Even keeping tennis, with 9,671 participants, in the fall, the spring remains substantially more crowded than the fall. *If tennis were switched to the spring, the imbalance would be much worse, whether or not the other parts of the District Court's order were implemented.* Under that order, volleyball (with 21, 919 participants) would be moved from the winter to the fall season and basketball (with 20,604 participants) would be moved from the fall to the winter. This switch would be good for some girls and bad for others, but it would not greatly alter the overall picture. Golf, with 3,713 participants, would be moved from spring into the fall; on balance that would alleviate the situation somewhat. Making those changes and leaving tennis in the fall would achieve near parity between the seasons. But moving tennis, with its nearly 10,000 participants, from the fall season to the more crowded spring season, would aggravate the already existing imbalance and plainly be an adverse development for girls.

<http://www.michigan.gov/hal/0,1607,7-160-17451_28388_28392-115498--,00.html>.

To be sure, this change would relieve a conflict for some girls. For example, if a girl's two favorite sports are tennis and cross-country, moving tennis to the spring would allow her to play both. But because the spring is already the far more crowded season, moving tennis will create far more conflicts than it will relieve. *Amica* Rebecca Friedman and Landria Christman are representative in this respect. Rebecca's two sports are tennis and softball; Landria's are tennis and soccer. If tennis remains in the fall season, each girl will be able to play both of her two sports throughout high school. If the tennis season switches to the spring, each will have to choose one sport or the other and give up a sport she loves to play and at which she excels. This is the type of loss that many girls throughout the Lower Peninsula will suffer if the seasonal imbalance is worsened by moving tennis from the less crowded season to the more crowded one.

F. The Fall Presents Better Opportunities for Girls to Compete Against Neighboring Out-of-State Schools.

The District Court put weight on the lost opportunities for interstate competition in volleyball created by the disjuncture of seasons across state borders. 178 F.Supp.2d at 826. But in the case of tennis, this factor cuts the other way: Switching girls' tennis in the Lower Peninsula to the spring would deprive girls of some excellent competitive opportunities that they now enjoy.[9]

G. Impact on College Scholarships Weighs Against, Rather than in Favor, of Switching Tennis Seasons.

Completely disregarding all the considerations discussed above, the District Court based its decision with respect to

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[9] *See, e.g.*, http://www.adrian.k12.mi.us/Schools/AHS/AHS_Page/Main.htm (listing matches between Adrian High School and Toledo-area schools).

tennis on its perception that playing high school tennis in the fall season disadvantages girls seeking college scholarships.[10] It relied primarily on the testimony of two out-of-state witnesses who claimed no familiarity with Michigan tennis. Their theory was that college coaches rely heavily in making recruiting decisions on United States Tennis Association ("USTA") tournaments held in the summer. Accordingly, the theory goes, players who have their high school seasons in the spring, shortly before those tournaments, are better prepared for them than those who play high school tennis in the fall. The theory has no merit.

First, impact on scholarship prospects is a fanciful concern for the overwhelming majority of girls who play high school tennis in Michigan. *Amicae* Rebecca Friedman, Monika Rizk, and Landria Christman are typical in this regard of high school tennis players. Each of them tried out for her school's tennis team because she loves the game; she loves to compete; she enjoys being a part of a team; and she is aware of the many benefits offered by playing an active, physically demanding sport for her high school varsity. Each is aware that among those benefits is the prospect that being actively engaged in a varsity sport, like any substantial extra-curricular activity, will likely make her a more interesting, better rounded, and generally stronger candidate for college *admissions*. But the prospect of a college *scholarship* plays no role at all in the commitment of any of these girls' commitment to the sport – or in their parents' support (in time, money, emotion, and mileage) for that commitment. At this point, these girls, who are ninth graders, do not know whether they will even want to

[10] The Court also said in passing that the spring season is about 20 days longer than the fall season. 178 F.Supp.2d at 836. In fact, in the Lower Peninsula, nominally the spring season is 14 days longer than the fall season. But because of the differential in weather, the effective, as opposed to the nominal, season is shorter in the spring than in the fall.

play tennis in college. A realistic assessment suggests that, though they are good players,[11] none of them is likely to be offered a college scholarship. Even if one of these girls is offered a scholarship, the chance that it will be at a college that she is interested in attending is very small; they will be guided principally by academics in making college choices. In short, for these three girls, as for most high school players, any impact of the assignment of seasons on the prospect of a college tennis scholarship is of no significance.

Second, Michigan girls cannot be disadvantaged by scheduling as compared to other Michigan girls, of course, or to most girls in the region or in the nation; as discussed above, the fall is when *most* girls in the nation, and in the states near Michigan, play high school tennis. *Cf.* 178 F.Supp. 2d at 820 (noting, as a factor favoring placement of girls' basketball in the winter, that it would put Michigan girls "on 'equal footing'" with most of their counterparts throughout the nation).

Third, even as compared to girls who play high school tennis in the spring, Michigan girls are not disadvantaged. The theory of the District Court appears to have been that colleges' evaluations depend completely upon the summer USTA tournaments and that playing on a high school team in the spring is the best possible preparation for those tournaments, saving a scholarship aspirant from having to choose between playing in them unprepared or preparing through private classes and lessons. But for several reasons this view utterly ignores reality.

(A) The summer USTA tournaments are far from the exclusive consideration for college recruiters. Performance in high school competition also plays a role. Though there are

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[11] Rebecca and Monika were the only freshmen playing regularly on the team that won the Division I championship for the Lower Peninsula in October 2006; Landria played second singles as a freshman on the team that placed second in the Division III championship.

more USTA tournaments in the summer, a player eager to play in such tournaments can find them all year round.[12] Rankings – a more comprehensive measure than performance in one or two tournaments – depend on cumulative performance in all those tournaments, and not in other competitions. Seedings in any given tournament also depend on rankings; thus, a player hoping to be seeded well in the summer tournaments must have played in a significant number of USTA tournaments beforehand.

(B) Given today's level of competition, nobody becomes a serious candidate for a college scholarship, and particularly an elite scholarship, merely by picking up a racket in time to play a high school season, whether spring or fall. A serious scholarship candidate must play year round, and private instruction and coaching are inevitably significant parts of the formula.[13]

(C) Playing on a high school team is not even the optimal preparation on the eve of elite tournaments. Indeed, some high-ranked players of high school age in Michigan decline to play on their high school teams because they feel doing so would distract them from more intense preparation and competition. The practice is especially prevalent among boys, whose high school season comes right before the summer tournaments. If the seasons were switched, the practice would probably become more prevalent among top-ranked girls than it is among boys, because at the upper levels, the competition in girls' high school tennis in the state is spread thin; a scholarship candidate

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[12] *See* the USTA website for finding tournaments, http://tennislink.usta.com/tournaments/Schedule/Search.aspx.

[13] To get a sense of the active, year-round tournament participation by Michigan's top-ranked players, one may examine the actual player records., which are posted on the USTA website. For example, the records for ranked 18-and-under female players in Southeastern Michigan are available at <http://tennislink.usta.com/tournaments/rankings/rankinglists.aspx?id= 295967>.

is far more likely to find a tough match in a spring USTA tournament than among her teammates or in most interscholastic competitions.

Fourth, the District Court offered only speculation, and no proof, that playing in the fall disadvantages Michigan girls seeking scholarships. *Cf.* 178 F.Supp.2d at 817 (recognizing the possibility that playing basketball in the fall, outside the collegiate season, increases ability of college coaches to see players, but noting that "the MHSAA did not offer any evidence to prove that this translated into more scholarships or spots on collegiate basketball teams than Michigan girls would otherwise receive"). That is hardly surprising. The experience of Michigan coaches, as represented by MHSTeCA, is that the proposition is simply not true.

Fifth, while acknowledging the significance of the points in other contexts, the District Court paid no attention to two factors that make the fall a *better* season for players seeking college scholarships.

(A) Because college tennis is a spring sport, coaches and other scouts have much more time in the fall to evaluate potential recruits. *Cf.* 178 F.Supp.2d at 817, 820-21 (recognizing force of this consideration in the context of basketball).

(B) The fall season, but not the spring season, is played before commitments by colleges and by students must be made. Accordingly, fall players have an extra year in which to be evaluated. *Cf.* 178 F.Supp.2d at 829, 832 (recognizing force of this factor with respect to soccer and golf).

It would be extraordinarily unfortunate if the supposed impact on scholarship prospects should cause girls' tennis to be moved from the fall, to the detriment of nearly 10,000 girls who play high school tennis in Michigan.

II. MHSAA'S NEED TO RECONCILE INTERESTS IN TRADITION SHOULD INFORM THE SUBSTANTIVE STANDARD GOVERNING ITS CONDUCT.

This is not a close call. The fall is clearly a far better season than the spring for high school tennis in Michigan. That is obvious to the entire Michigan high school tennis community.

Given this, how did the District Court fall into such clear error? The structure of the litigation helps provide an answer. The plaintiffs, Respondents in this Court, had a strong interest to demonstrate pervasive discrimination against girls in the allocation of seasons; as Petitioner suggests, Petition at 7, this suit was mainly about volleyball, but there was no warrant for a federal court order moving the volleyball season without proving a pattern of discrimination. Petitioner MHSAA, on the other hand, had a wide range of interests to reconcile, because its responsibility extends to many sports, and both to boys and girls; not surprisingly, therefore, it emphasized the complexity in allocation of seasons rather than the advantages of one season over another. *Amici* emphasize once again that they do not mean any criticism of either Petitioner or of Respondents in pointing this out; both have served their interests as they thought best. The fact is that the interests of neither align with those of girls' tennis. Thus, evidence of the sort presented in this brief was not put before the District Court, and MHSAA, when required to designate two sports for a switch of season, chose tennis as one of them – a switch that would be good on the whole for boys but very bad for girls.

The procedure leading to the District Court's order was therefore seriously flawed. Beyond that, the fact that MHSAA, and statewide athletic administrative agencies like it, have such a complex range of interests to reconcile is a factor that should inform this Court's choice of standards governing the determination of whether they have discriminated in their allocation of athletic seasons.

CONCLUSION

This Court should grant the Petition to ensure national uniformity in the standards for determining whether statewide administrative agencies have discriminated in their allocation of athletic seasons. And by reviewing this case, this Court can prevent a result that would be both ironic and highly unfortunate. The District Court's order was entered for the purpose of preventing discrimination against girls. But it will make the situation worse, not better, for female tennis players. For the indefinite future, the thousands of girls who play high school tennis every year in Michigan's Lower Peninsula will be forced to play in a season that is much less preferable than the one in which they now play. They will be forced to do so on the basis of remarkably skimpy evidence and flawed analysis, the result of a process in which the interests of girls' tennis were not adequately represented..

Some of the factual assertions made in this brief are acknowledged (in other contexts) in the opinion of the District Court. Most of the others are "not subject to reasonable dispute" under the standards of Fed. R. Evid. 201. Accordingly, *amici* believe that a reviewing court can take judicial notice that the fall is the better season for girls' high school tennis in Michigan. At the very least, this Court should require that no change in tennis seasons be made absent careful fact-finding with respect to tennis.

The fact that girls in Michigan play high school tennis in the fall provides no support for – and instead weighs *against* – the conclusion that MHSAA has discriminated against girls in the allocation of seasons. Furthermore, if it is ultimately determined that MHSAA did discriminate, the remedy should not include a provision requiring girls to play their high school tennis season in the spring. If such a provision is allowed to stand, then to the extent this litigation concerns tennis, it will have achieved precisely the opposite of the goal for which it was brought.

Respectfully submitted,

RICHARD D. FRIEDMAN
Counsel of Record
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 647-1078

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Appendix

In this cartogram of the continental United States , the size of the representation of each state is proportional to its population. States in which girls' high school tennis is played in the fall are shaded; states in which girls' high school tennis is played in the spring are unshaded.

(2)

No. 06-1038

FEB 21 2007

In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Petitioner,

v.

COMMUNITIES FOR EQUITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF THE MICHIGAN INTERSCHOLASTIC ATHLETIC ADMINISTRATORS ASSOCIATION IN SUPPORT OF PETITIONER

ALLEN S. BUSH
Counsel of Record
ALLEN S. BUSH, P.C.
2607 EAST CROWN DRIVE
TRAVERSE CITY, MI 49684
(231) 929-7620

Attorney for Amicus Curiae Michigan Interscholastic Athletic Administrators Association

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF THE AMICUS

The Michigan Interscholastic Athletic Administrators Association (MIAAA) is a Michigan not-for-profit corporation composed of more than 700 members, who are athletic administrators in the public and private schools of Michigan. The members of the MIAAA are generally charged with the day to day administration of the athletic programs of their respective schools. They are in charge of scheduling contests and facilities, hiring and evaluating coaches and workers, and insuring compliance with all of the rules and regulations of their school district, their leagues, and the Michigan High School Athletic Association as the rules would pertain to the entire interscholastic athletic program. Because of the profound effect of the consequences of the lower Court's rulings upon the day to day activities of the members and the programs they administer, the MIAAA is filing this brief in support of the Petitioner. The parties were asked to consent to the filing of this brief and both parties have consented.[1]

SUMMARY OF ARGUMENT

Michigan has produced an exemplary athletic program for males and females for more than the past three decades. Utilizing any system of measurement, whether it be the number of participants in athletic programs, the number of tournament sports offered, or the number of student athletes who have gone on to higher levels of athletic competition,

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[1] Counsel for the parties of this case did not author this brief in whole or in part. No person or entity, other than the amicus curiae MIAAA, its members, and its counsel made a monetary contribution to the preparation and submission of the brief.

Michigan has exceeded the per capita ratios of all but the most populated states.

The District Court and the 6th Circuit Court of Appeals both wrongfully decided that the setting of schedules for athletic seasons in Michigan, in authorized single-sex programs, was a facial gender classification sufficient to presume animus and thereby shift the burden of proof away from the plaintiff and onto the Michigan High School Athletic Association (hereinafter, the MHSAA). Despite undisputed evidence that the programs for female athletes had succeeded in creating participation opportunities greater than the national norm, the MHSAA was left with the presumption that it and its member schools had discriminated to the detriment of certain elite female athletes.

Of equal, or even greater moment, is the standard that the Sixth Circuit has made the law of the Circuit for the administration of school athletic programs. If every difference in permissible single sex programs is sufficient to raise a constitutional question, then a veritable flood of litigation will arise from routine decisions that might be questioned by disgruntled parents or athletes. The ultimate result will be to reduce all athletic teams to a single team per sport per school and to revert to a time of limited athletic opportunity for fewer students, especially females.

This amicus urges the Court to contemplate the better alternative. Particular differences in athletic programs should only be unconstitutional if a plaintiff can prove that there has been intentional discrimination resulting in harm to that plaintiff. Title IX should provide the exclusive remedy for all claims of gender bias in athletic programs, so that all of the concerns of the athletic program and its administration are

considered within the totality of the programs, not in the piecemeal fashion of individual lawsuits.

REASONS FOR GRANTING THE WRIT

In 1966, Lansing Sexton High School, a large urban high school located in the capitol city of Michigan, offered an athletic program consisting of nine varsity sports; all male (females could try out, but few did and very few made the teams). There was one basketball team, one swimming team, one track team, one cross-country team, one wrestling team, one golf team, one tennis team, one baseball team, and one football team. The coaching staff consisted of a dozen male coaches. The school had one gymnasium and the athletic director was the boys' physical education teacher/wrestling coach, who was given one hour of release time to administer the athletic program.

In 2004-5, Lansing Sexton High School still had one gymnasium, but offered twenty varsity sports; ten male and ten female. There was still one football, baseball, and wrestling team, but there were two of every other sport, except volleyball and softball, which were exclusively reserved for females. The coaching staff had more than 30 coaches, nearly evenly divided by gender. There was a building athletic director with the full time job of administering the athletic program for the school and a district-wide athletic director to coordinate the programs among the various high schools and junior high schools in the city. Female participation has more than doubled the number

of athletes and athletic opportunities from the program of the forty years ago.[2]

The Sexton example has been replicated, to some degree, throughout the state of Michigan in every school district, public and private. The massive growth in athletic opportunities has evolved by a judicious use of facilities, the development of feeder programs in the lower grades, a nurturing of single sex programs, and a commitment to provide quality educational-athletic experiences for all of the young people of the state, regardless of gender.

The principle reason for the prodigious increase in athletic teams and participation opportunities was the enactment of Title IX, 20 USCS 1681-1688. The statue, coupled with the explosion of media coverage of all athletic activities in our society, has created a public demand for more varsity sports.

The MIAAA would urge this Court to accept the preemption of all claims related to gender equity in the schools by Title IX. Every issue related to gender and school athletics is monitored by the Office of Civil Rights, so that there is a forum for every perceived inequity, no matter how minute or trivial the issue. Title IX provides a comprehensive system for monitoring, administering and adjudicating the issues of gender equity in high school athletics. This amicus would also urge this Court to resolve the conflict among the Circuits as to the proper test to be applied to facially neutral decisions that affect permissible single-sex teams and to clearly delineate a requirement for individual claimants that

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[2] Interview with Melanie Miller, athletic director, ret. J.W. Sexton H.S., Lansing, MI, April, 2005.

they must prove intentional discrimination in order to prevail on a claim.

All of plaintiff/appellee's claims and all of the opinions of the Courts below rest upon an incorrect conclusion; that the female athletes of Michigan are disadvantaged by the placement on the calendar of the currently scheduled athletic seasons. The data that has been compiled, in the time between the appeal, remand, rehearing and this petition, conclusively demonstrates that the Michigan model of athletic seasons has been more successful in creating and maintaining athletic opportunities for female students than the plaintiff's model. Therefore, an analysis of the real intent of the MHSAA and its member schools, with an eye to the total athletic program for females in the state, reflects that those programs have been a resounding success in terms of opportunities for female athletes and contradicts the opposite conclusion of the preceding Courts with their presumption of discriminatory animus.

PARTICIPATION AND OPPORTUNITY

Michigan, utilizing its model for seasons, has continued to reflect higher participation numbers for all of its sports offerings and especially for female sports.[3] Michigan ranks eighth in the nation for total population of boys and girls ages 14-17, but has participation rates that place it fifth highest in the nation in all sports offerings.[4] In the 2005-2006 school year, more than 20,000 Michigan girls played high school

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[3] MHSAA News, June 8, 2005.

[4] 2005-2006 National Federation of State High School Athletic Associations' Athletic Participation Survey.

basketball and more than 21,000 Michigan girls played high school volleyball. (Winter volleyball was the most popular female sport).[5] We believe that these statistics are directly related to the quality of the experience and to the use of the Michigan model of sports seasons. Michigan provides 14 tournament sports seasons for exclusive female participation and provides 14 tournament seasons for males. Also, it is important to note the fact that females are not excluded from participating on the "boys" team if their school does not offer the same sport for females, while males are excluded from participating on "girls" teams under the same circumstances. This important fact was not recognized in the Courts below when they evaluated the 'disadvantage' to females from the current scheduling system. There is certainly no evidence of discrimination against females in the provision of athletic seasons, the quantity or quality of the athletic programs or the sheer number of opportunities presented for females to participate in athletics in Michigan.

In states that 'voluntarily' switched their girls' basketball and volleyball seasons, many of whom were motivated by the desire to avoid protracted litigation similar to this case, the results have been ominous. The National Federation of High School Athletic Associations has reported the following: North Dakota reported a decline of 10.6% in girls' basketball participation and a 7% drop in volleyball participation; South Dakota, within two years of the change, dropped 13.1% in girls' basketball; Montana, within two years of the change, dropped 10.9% in girls' basketball and 8.1% in girls' volleyball; and in West Virginia, since the change was made in 1985-86, the number of girls and boys playing basketball

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[5] 4. Ibid.

has dropped 19.4% and 27.4%, respectively.[6] The decline in participation in those states can only be blamed on one factor, the change in seasons.

High school athletic participation in Michigan is a privilege, not a right. *Berschback v. Grosse Pointe Public School Dist.*, 154 Mich. App. 102, 397 N.W.2d 234, 1986 Mich. App. LEXIS 2841 (1986). The high school athlete must meet conditions precedent to even trying out for a high school team. They must be enrolled in their high school. They must pass a physical examination. They must attain and maintain certain academic standards. They must agree to abide by an athletic code of social and behavioral conduct, in addition to the general student code of conduct. These conditions are what distinguish the educational-athletic experience of the MHSAA member schools from the private sports world of the AAU (Amateur Athletic Union) or from the professional athletic leagues. Common sense tells us that if the programs for female athletes were rife with discrimination, or inferior to male programs, female athletes would not be willing to meet the conditions precedent to participation, let alone participate in record numbers. In Michigan, overall female participation in all tournament sports increased by 22% in 2004-5.[7]

ADMINISTRATION AND EQUALITY

Athletic directors and coaches must make thousands of decisions related to the operation of an athletic program.

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[6] Memorandum to Representative Council. Jack Roberts, Executive Director, Nov. 5, 2004.

[7] MHSAA News. June 8, 2005

They must allocate the use of finite facilities and budgets. They must make subjective decisions on a myriad of issues that make a student's athletic experience unique to the school, to the student, and to the time and the place of the experience. Because each student will have a unique experience, it is impossible for an athletic experience for boys and girls to be absolutely identical. Athletic programs cannot provide the same gym to each team in the same sport at the same time of day (especially if there is only one gymnasium for six different basketball squads), or the same coach with the same uniforms, practice plans and strategies. Under the holdings of the Sixth Circuit, each decision concerning a female athlete or female team that differs from the experience of a male athlete or male team could be considered 'disadvantageous' and subject to a presumption of discriminatory motive, which will compel the Athletic Director to demonstrate an exceedingly persuasive argument for the decision.

Aside from just selecting the date, time, and location of contests for boys' and girls' teams, Athletic Directors have to consider every detail of the athletic programs. Even assuming the uniforms and practice equipment can be purchased uniformly for all teams regardless of gender, the most likely areas of dissimilarity will occur with the issues which have been the most difficult to resolve under Title IX. These areas are the quality and availability of coaches and game personnel, the use of limited facilities, publicity, fundraising, and off-season activities.

Many small and rural school districts have used the same coaching staff for boys' and girls' teams. With the seasons being changed to run simultaneously, it is unlikely the staff can operate both programs. The selection and hiring of quality coaches, officials and game workers appears to have become a constitutional question if some individual takes issue

with whether the two programs were equally disadvantaged by the quality of the hirings related to their individual sport.

In the smaller high schools in the State of Michigan, it is rare to have access to more than one full-sized gymnasium. The scheduling of practice times and locations for various team levels (each basketball program customarily has three teams: a varsity, a junior varsity, and a freshmen team, per gender), whether in the high school or at smaller elementary gyms, would need to be precisely the same. It is impossible to replicate the precise practice times for each of the teams in the same facility. This would include auxiliary activities such as Saturday and Sunday open gyms, weight training, or water training activities, and all of the scouting functions, video player access and medical training rooms. It will be impossible to replicate the precise times of the day for each similarly situated team to utilize the limited facilities for an exclusive team activity. There is simply no exceedingly persuasive argument for having the girls' varsity start practice at 3 p.m. and the boys' start at 4 p.m., other than someone needs to go first.

One special facilities problem for older or smaller schools with one varsity locker room is the use of that space. Any school constructed before 1980 does not have a varsity locker room that accommodates females. If the choice is to reconstruct the building or have a single basketball team, the likely choice is the latter.

Publicity has been an area of concern for the Office of Civil Rights under Title IX for many years. The concept is not only the amount of media coverage but also the equal promotion of all of the teams. This concept includes the use of pep bands, cheerleaders, pep assemblies, and any other facet that contributes to the experience of the evening such as

concession stands, meet- the-team nights, parents' nights, and booster organizations. It is difficult for this author to conceive that having or not having a concession stand at a high school basketball game gives rise to a presumptive violation of the United States Constitution.

Fundraising for high school sports has become a major problem for athletic administrators. The school districts have not increased athletic budgets to match the huge growth in athletic programs, which is due, in large part, to the ever-growing interest of girls in athletics. It is most common for the schools to encourage the formation of booster clubs to provide supplemental funds for the programs. If the clubs are sport specific, their success tends to mirror the traditionally successful programs. If the club is a universal club, it supports all of the sports teams and is usually administered by the athletic director who allocates the funds to the teams. In either case, the athletic administrator cannot operate the programs without the booster funds, but it is likewise impossible to assure that each of the teams will receive precisely the same dollar amounts under either system. Whatever decision-making criteria are applied to the distribution of funds they will not be exceedingly persuasive if they are not exactly the same.

The list of potential discrepancies between the various male and female programs is endless. The athletic administrators are currently challenged to meet the 'essentially equivalent' standards applied by the Office of Civil Rights for Title IX compliance. In trying to balance the individual preferences of coaches, competing schools, the availability of scarce facilities, talented workers and game officials, the need to be exceedingly persuasive for all of the decisions that are made makes the separation of teams an impossible burden. The schools will always look for the

simplest and cheapest method to resolve their problems. In the instant case, to avoid endless litigation over trivial distinctions, the schools will either abandon athletics all together (an idea that would be politically unpopular) or resort to athletic teams open to all genders, thus, reversing thirty years of gender equity progress.

Schools are not in the litigation business. To avoid the inevitable litigation over facilities, staffing, and programs, they will reduce or eliminate single sex athletic programs. Any reduction in programs means a loss of participation opportunities for some girl or boy. Program reductions will undoubtedly fall hardest on the poorer school districts that tend to lack expansive and expensive facilities, smaller rural communities, and upon the less athletically talented children, because sub-varsity programs will be eliminated. Reduction in female participation will also, logically follow if the schools are compelled to return to a single team per any one sport. If only fifteen of the best athletes in the school are given the opportunity to play on the team, activities that reward the bigger, stronger, and faster people will be heavily male, due to physiology.

As previously noted, most Michigan school districts offer two or three teams of a particular sport, per gender, per season. There is a varsity team, a junior varsity team, and a freshman team (if the school has ninth graders in the high school and/or if the population of the school is large enough). Commonly, there is also a companion program reaching into the late elementary school age children of both genders in all of the sports, known as a feeder program. The feeder programs are also, usually, under the control and administration of the High School Athletic Director or Varsity coach.

If we use basketball as an example, each team at each level in the high school and junior high school generally has fifteen players. By eliminating just one of the sub-varsity programs for each gender, the school can alleviate some of the most common problems of scheduling gym usage, obtaining quality coaches, and in reducing the number of decisions that might give rise to a legal challenge. However, by eliminating a sub-varsity program some thirty children would not have a high school basketball experience. In the 2004-05 school year, seven hundred and twenty schools sponsored girls' basketball in the state of Michigan with 20,541 girls participating.[8] If just ten percent of the participation opportunities are lost due to the change of seasons in just the sport of basketball, more than two thousand females would not have a high school basketball opportunity. Logically, the same results will follow in all of the sports programs at issue in this case. From an educational standpoint, the loss of female athletic participation opportunities would be a serious and tragic loss.

Numerous studies reflect the value to society of the participation of young women in high school athletics. The studies demonstrate: higher self-esteem; lower use of alcohol, drugs, and tobacco; lower dropout rates; and fewer teen pregnancies.[9] It simply does not make any sense to apply legal standards that create a direct and deleterious effect upon the participation opportunities of female high school athletes. The rationale of a 'seasons plan' that increases or at least

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[8] 2004-2005 National Federation of State High School Athletic Associations' Athletic Participation Survey.

[9] Survey Resources: The Case for High School Activities, National Association of High School Athletic Associations, 2005.

maintains an athletic opportunity for females, surely, is more persuasive, then a plan that has been proven to destroy opportunities.

Additionally, the next group of plaintiffs, who represent the thousands of non-elite female athletes, will surely argue that the loss of athletic opportunity for the less talented female players is disadvantageous. Under the law of the 6th Circuit, that finding would create a presumption of discrimination. Surely, the arguments of the children who had lost their opportunity to participate at all will be as compelling as the findings below that some elite females have been disadvantaged by not being recruited by as many colleges or not being named to as many all-star teams. Can it really be a significant concern to the average female athlete, when the girls' high school basketball tournament is played, *if she has no team to play on?*

CONCLUSION

The decision of the District Court was wrong for many reasons, but principle among them, is that the District Court simply presumed a discriminatory purpose and did not weigh the advantages and disadvantages of the tournament seasons in light of the effect on athletic participation opportunities. The lower Courts merely compared single-sex teams of the same sport on only the aspect of scheduling the season and its state tournament. They erroneously concluded that certain seasons were disadvantageous. The ultimate conclusion of the Courts below was that the Association and thereby its member schools, had discriminated against the female athletes of the state. Despite repeated efforts to get the District Court to broaden its scope of analysis, it refused, as did the 6th Circuit on appeal and on re-hearing. At every step of the proceedings this amicus has asked the respective Courts to

consider the larger picture and to focus on the quintessential element of any athletic program; the opportunity to participate in a sport. We have consistently urged the adoption of the requirement that an individual plaintiff be compelled to prove intentional discrimination on the part of the decision-maker as an element of their case. The presumption of discriminatory animus with its requirement of providing an exceedingly persuasive reason by a preponderance of the evidence is too great a hurdle for the local athletic administrator to overcome in too many decisions in the day to day operation of single sex programs.

High School athletic programs are extensions of the classroom. They are not minor leagues for college or professional development. They are not entertainment athletics where the coaches and players are paid with lavish salaries or scholarships to participate. They are educational opportunities provided, in the overwhelming majority, to average children with average athletic talent. The ultimate effect of the decision of the 6th Circuit will be to destroy opportunities and to reverse the increases in female athletic participation that have been developed over the past thirty-four years. We urge this Court to accept the Petition of the MHSAA and to settle the law, consistent with the arguments and conclusions of the Defendant/Appellant, MHSAA.

Respectfully Submitted,

ALLEN S. BUSH P.C.

Allen S. Bush (P30283)
Counsel of Record
2607 East Crown Drive
Traverse City, MI 49684
(231) 929-7620

Counsel for Amicus Curiae
Michigan Scholastic Athletic
Administrators Association

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No. 06-1038

In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Petitioner,

v.

COMMUNITIES FOR EQUITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS IN SUPPORT OF PETITIONER

WILLIAM E. QUIRK
Counsel of Record
AARON M. HOUSE
SHUGHART, THOMSON & KILROY, P.C.
TWELVE WYANDOTTE PLAZA
120 W. 12TH STREET
KANSAS CITY, MO 64105
(816) 421-3355

Attorneys for Amicus Curiae National Federation of State High School Associations

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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STATEMENT OF INTEREST[1]

The National Federation of State High School Associations ("NFHS") is the national service and administrative organization of high school athletics. Founded in 1920, the NFHS is composed of one high school athletic association in each of the fifty states and the District of Columbia. The NFHS's membership, in turn, provides membership for approximately 90 percent of the high schools in the United States.

The NFHS's mission is to provide leadership and national coordination for the administration of interscholastic athletics. The NFHS works to enhance the educational experiences of high school students and to reduce the risks to them of participating in interscholastic athletic programs. The NFHS strives to promote participation and sportsmanship, to develop good citizens through activities that provide equitable opportunities, and to maximize the achievement of educational goals. The NFHS exists to protect and promote the best interests of high school boys and girls.

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37, the NFHS states that this brief has not been authored in whole or in part by counsel for a party to this case. The brief was instead authored by outside counsel for the NFHS. The NFHS further states that no person or entity other than the NFHS made a monetary contribution to the preparation or submission of this brief. Although petitioner MHSAA is a member of the NFHS, and has paid the standard annual membership dues, it has not made any specific financial contribution to this brief's preparation or submission.

The NFHS's mission and objectives give it a significant interest in successfully implementing separate-gender athletic programs in American high schools. Separate programs are essential to meaningful and rewarding participation for both genders. The Sixth Circuit's decision in this case would complicate the operation of separate programs by making even routine decisions presumptively unconstitutional. The Court should grant certiorari to address the Sixth Circuit's erroneous equal-protection analysis, which the NFHS believes will harm interscholastic athletics.

SUMMARY OF ARGUMENT

The Court should grant certiorari to address the wisdom of the Sixth Circuit's decision to subject the MHSAA's athletic scheduling determinations to heightened scrutiny. Although demanding that administrators advance an "exceedingly persuasive justification" for their conduct might initially appear to promote gender-equity in high school athletics, the NFHS believes it may well have the opposite effect. Routine implementing decisions that are not facially discriminatory should not be subjected to strict scrutiny. Educators already face a heavy burden as they strive to allocate scarce resources between genders. The goals of separate-gender athletics would be better served by requiring those who would challenge such allocation decisions to show discriminatory intent or overall inequality to establish a constitutional violation. At a minimum, administrators should not have to defend such routine decisionmaking by satisfying the "exceedingly persuasive justification" burden of *United States v. Virginia*, 518 U.S. 515 (1996) ("*VMI*").

ARGUMENT

The NFHS fully embraces Title IX, and seeks to promote, to the fullest practicable extent, equality in high school athletics. The NFHS wants to encourage sports participation for both girls and boys. The judgment below threatens to impede these efforts.

Notably, this case does not involve a challenge to the threshold decision to have separate athletic teams for boys and girls at the high school level. Respondents, like society in general, recognize and accept the benefits of separating sports by gender. Respondents' attack is instead directed at one of the many specific decisions that become necessary once the initial decision is made to conduct separate sports for high school boys and girls. The Sixth Circuit's decision below to make all these routine implementing decisions subject to heightened scrutiny[2] may well lead to unintended consequences.

The Sixth Circuit's application of the heightened scrutiny standard established in *VMI* would automatically, and the NFHS believes unfairly, subject everyday discretionary decisions to a presumption of intentional discrimination. This presumption will encourage challenges to, and unwarranted second-guessing of, every routine decision made to implement the different programs. Educators and officials will be saddled with the knowledge that every seemingly innocent decision they make will require an "exceedingly persuasive justification[,]" *VMI*, 518 U.S. at 531, and that mere "reasonableness" will not suffice.

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[2] *See Communities for Equity v. Michigan High School Athletic Ass'n*, 459 F.3d 676, 694 (6th Cir. 2006).

Once the threshold decision has been made to establish separate athletic programs for boys and girls, many implementing decisions become necessary. For example, high school administrators often have limited resources to allocate between girls' and boys' programs, and must decide which seasons are most appropriate for each sport, taking into account the real need in many circumstances to share coaches and facilities, as well as the wishes of the participants themselves and their families. Even when a determination is made that sharing the same season is feasible, countless routine scheduling decisions become necessary, decisions that plainly cannot satisfy every constituency. Scheduling boys' games during the day, and girls' at night, or vice versa, may offend either or both genders. The Sixth Circuit, in fact, simply characterized *all* the scheduling decisions made by the MHSAA for girls' sports as "disadvantageous," 459 F.3d at 693, despite record evidence that many girls and their families preferred the chosen seasons. *See* Pet. at 6-10. How as a practical matter will every one of these decisions be subjected to a "heightened scrutiny" standard?

Educators must make more than just scheduling decisions. There traditionally has been a perceived need, based on gender differences, to modify the rules in some sports in which both boys and girls participate. The NFHS publishes such rules, and they have been adopted by almost all state high school associations. The rules provide for a smaller-circumference basketball for girls and a lower net height for volleyball. In track and field, there are height and spacing differences for girls' hurdling events. The girls' javelin is shorter and lighter. Girls are given shorter distances in the long-jump and triple jump to reach the pit. Body checking, which is allowed in boys' ice hockey, is prohibited in the girls' sport. Reasonable people can argue that many of these distinctions between boys' and girls' sports should be

modified, or even eliminated entirely. The logical extension of the Sixth Circuit's approach, however, would be to treat each of these rules differences as a "facial classification," thereby subjecting them to heightened scrutiny and demanding "an exceedingly persuasive justification" to support them. This cannot be constitutionally necessary.

From a practical standpoint, these sorts of implementing decisions by educators should not be viewed so skeptically. In the NFHS's experience, the vast majority of high school educators make their decisions with the proper allocation of resources and gender-equality in mind. Because virtually any decision can be said to favor either boys or girls, imposing a presumption of discrimination will only make it more difficult to allocate scarce resources fairly. The Court should recognize these decisions for what they almost always are – discretionary determinations made in good faith by educators to promote competitive opportunities for both genders.

The NFHS believes that facially-neutral implementing decisions, like the MHSAA's scheduling decisions at issue here, should not require the "exceedingly persuasive justification" of *VMI*. Once the decision is made (and accepted) to conduct separate sports by gender, decisions necessary to implement that separation should no longer be considered facial classifications calling for heightened scrutiny. Such decisions might more appropriately be candidates for "rational basis" review, *see, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985), or for some intermediate standard that does not require the "exceptionally persuasive justification" required by the

decision below.[3] Regardless of which test is applied, however, the Sixth Circuit's approach seems clearly unworkable as a practical matter. The Court should grant certiorari to consider whether the application of *VMI's* heightened scrutiny standard to everyday implementing decisions best serves the needs of an already burdened system or promotes the goals of separate-gender sports.

CONCLUSION

For the foregoing reasons, as well as those in petitioner's brief, the petition for writ of certiorari should be granted.

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[3] *See, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying test in gender discrimination setting that looked simply to whether challenged classification served "important governmental objectives" and was "substantially related to achievement of those objectives"). Although the Court in *VMI* ostensibly subjected Virginia's facial classifications to intermediate scrutiny, the Court's insistence that Virginia not only satisfy the substantial relationship test, 518 U.S. at 524, but that it also advance "an exceedingly persuasive justification" for the classification, *id.* at 532-33, has arguably clouded the appropriate test and increased the burden necessary to justify a defendant's actions. *See VMI*, 518 U.S. at 559 (Rehnquist, J., concurring) ("It is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test."); *see also id.* at 571-72 (Scalia, J., dissenting).

Respectfully submitted,

WILLIAM E. QUIRK
Counsel of Record
Aaron M. House
SHUGHART, THOMSON &
KILROY, P.C.
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355

Attorneys for Amicus Curiae

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